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Issue date: 08Jan2002

CASE NOS.: 1998-LHC-2183; 2001-LHC-0860/2483

OWCP NOS.: 6-170850; 6-164888/6-161990

In the Matter of:

MARIA LORENA SMITH
Claimant

v.

HURLBURT AIR FORCE FIELD/ CHILD DEVELOPMENT CENTER
Employer/Self-Insurer

and

AIR FORCE INSURANCE FUND
Third Party Administrator

and

Director, Office of Workers' Compensation Programs, United States Department of Labor
Party-in-Interest

APPEARANCES:

Meagan A. Flynn, Esq.
Peter W. Preston, Esq.
For the Claimant

Roy H. Leonard, Esq.
For the Employer/Self-Insurer

John Rainwater, Esq.
For the Director

BEFORE: DAVID W. DI NARDI
District Chief Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), and the Non-Appropriated Fund Instrumentalities Act, 5 U.S.C. §8171, **et seq.**, herein referred

to as the "Act." The hearings were held on June 5, and 6, 2001 in Salt Lake City, Utah, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Stipulations and Issues

The parties stipulate and I find as follows with reference to the three injuries before me:

A. With reference to the alleged stress claim for benefits (1998-LHC-2183, 6-170850): (TR 10, 12)

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant alleges that she suffered an injury on or about August 9, 1996 in the course and scope of her employment.

4. Claimant gave the Employer notice of the alleged injury on or about that date.

5. Claimant filed a timely claim for compensation on or about that date and the Employer filed a timely notice of controversion on September 4, 1996.

6. The parties attended an informal conference on June 13, 1997.

7. The applicable average weekly wage is in dispute.

8. The Employer has paid no benefits on this claim. (TR 12)

The unresolved issues in this proceeding are:

1. Whether Claimant's alleged stress claim constitutes a work-related injury.

2. If so, the nature and extent of her disability.

3. Claimant's average weekly wage.

4. Claimant's entitlement to an award of medical benefits

for such alleged injury.

5. Claimant's entitlement to interest on any unpaid compensation benefits, as well as additional compensation, pursuant to Section 14(e) of the Act, and her attorney's entitlement to an attorney fee and reimbursement of litigation expenses.

B. With reference to the Claimant's back injury claim (2001-LHC-860, 6-164888 or 14-164888): (TR 12, 13)

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On February 24, 1995 Claimant alleges that she suffered an injury in the course and scope of her employment.

4. Claimant the Employer notice of the injury on or about that date.

5.a. Claimant filed a timely claim for compensation on or about February 24, 1995 and the Employer filed a timely notice of controversion on June 25, 1998.

5.b. the Employer has not filed the Form LS-207 herein.

6. No informal conference was held.

7. The applicable average weekly wage is $270.05.

8. The Employer voluntarily and without an award has paid benefits on this claim as is reflected on the Forms LS-206 and LS-208. (RX 50). No permanent benefits have been paid.

9. The date of maximum medical improvement is October 28, 1996.

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.

2. Claimant's entitlement to medical benefits and reimbursement and/or payment of any unpaid medical expenses.

3. Claimant's entitlement to interest on unpaid compensation benefits, as well as additional compensation, pursuant to Section 14(e) of the Act, and her attorney's entitlement to an attorney fee and reimbursement of litigation expenses.

C. With reference to the Claimant's right knee injury (2001-LHC-2483, 6-161990): (TR 16, 17)

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant suffered an injury on March 21, 1993 in the course and scope of her employment.

4. Claimant gave the Employer notice of the injury on or about that date.

5.a. Claimant filed a timely claim for compensation on or about March 22, 1993 and the Employer filed a timely notice of controversion on September 6, 1994.

5.b. the Employer has not filed the Form LS-207 herein.

6. No informal conference was held.

7. The applicable average weekly wage is $244.00.

8. The Employer voluntarily and without an award has paid benefits on this claim as is reflected on the Forms LS-206 and LS-208. (RX 51). Some permanent benefits were paid on June 7, 1995. (TR 247-48)

9. The date of maximum medical improvement is May 1, 1996.

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.

2. Claimant's entitlement to medical benefits and reimbursement and/or payment of any unpaid medical expenses.

3. Claimant's entitlement to interest on unpaid compensation benefits, as well as additional compensation, pursuant to Section 14(e) of the Act, and her attorney's entitlement to an attorney fee and reimbursement of litigation expenses.

The following post-hearing evidence has been admitted:

Exhibit No.	Item	Filing Date
ALJ EX 20	Referral letter of June 19, 2001 from District Director Karen P. Staats transferring Claimant's	06/22/01

	companion claim for her March 21, 1993 injury, identified by the OWCP as 6-161990 (2001-LHC-2483, as well as the	
ALJ EX 21	June 14, 2001 Form LS-18 filed by Claimant	06/22/01
RX 54	Attorney Leonard’s status report	08/13/01
CX 59A	Attorney Flynn’s letter filing the following evidence on behalf of the Claimant	08/14/01
CX 60	July 8, 1997 Public Health Advisory by the FDA relating to “Fen-Phen”	08/14/01
CX 61	December 3, 1998 surveillance report of Rituccia & Associates, Inc.	08/14/01
CX 62	Surveillance Videotape	08/14/01
CX 63	July 31, 2001 supplemental testimony of the Claimant	08/14/01
RX 55	Attorney Leonard’s letter filing the following evidence on behalf of the Employer	08/31/01
RX 56	July 10, 2001 Deposition Testimony of Terry C. Sawchuk, M.D.	08/31/01
RX 57	July 17, 2001 Deposition Testimony of Russell L. Sorensen, M.D.	08/31/01
RX 58	July 17, 2001 Deposition Testimony of Byron Buckley Hall, Jr.	08/31/01
RX 59	June 1, 2001 Deposition Testimony of Jeffrey A. Ayers, D.O., as well as the	08/31/01
RX 60	Exhibits used by Dr. Ayers at his deposition	08/31/01
RX 61	Attorney Leonard’s letter confirming the post-hearing briefing schedule	09/21/01
RX 62	Employer’s brief	10/15/01
CX 64	Attorney Flynn’s cover letter	10/17/01

	filing	
CX 65	Claimant's brief	10/17/01

The record was closed on October 17, 2001 as no further evidence was filed by the parties.

Summary of the Evidence

Maria Lorena Smith ("Claimant" herein), who was born in Santiago, Chile on May 11, 1965 and who has a high school education and who has a varied employment history, began working in June of 1989 as a child caregiver or child development program assistant at the Child Development Center at Hurlburt Air Force Field ("Employer" or "CDC") in Hurlburt Field, Florida. Claimant had no prior experience as a child caregiver, other than raising her two children, Michael aged thirteen and Veronica aged seven as of the date of the hearing, and the Employer gave her no training in that field. The parties deposed Claimant on July 27, 2000 (CX 58) and that transcript will be used to provide background about Claimant and the three injuries before me. (TR 43-46)

Claimant, who has also worked at the Eglin Air Force Base and who had no prior medical problems prior to going to work for the Employer, testified that she injured her right knee on March 21, 1993 "in a temporary building" at the CDC when "we had to attach floor mats to the floor because - - to be under tables where the children were seated to play" and because "we could not have carpet." As she was "nailing some floor mats" and as she "was under a table," she "twisted" and "hurt (her) knee." The Employer provided treatment for that right knee injury in the form of x-rays and physical therapy. However, the right knee symptoms continued and her problem was diagnosed as a torn meniscus, and in August of 1994 Dr. Theodore Macey performed right knee surgery. The Employer has paid medical benefits for the "surgery, medication and therapy" and also paid her benefits for temporary total disability from August 14, 1994 through November 27, 1994, or a total of $2,627.10. Some additional temporary total disability was paid at a later date and the Employer paid her for her sixteen (16%) permanent partial disability on June 7, 1995, or a total of $7,495.83. Claimant still experiences right knee pain and she is unable to kneel or squat because of that injury. Dr. Russell Sorensen, an orthopedic surgeon, treats her bilateral knee problems. (CX 58 at 4-34)

Claimant injured her lower back on February 24, 1995 when she "was getting down on the floor to put a baby to sleep and (Claimant) fell back... lost (her) balance and (she) fell back."

As the injury occurred near the end of her shift, she reported the injury to her supervisor and rested the weekend, but the symptoms persisted and "a week or two after" the injury, she sought medical treatment at a nearby clinic in Fort Walton and was treated by medication and physical therapy. She could not recall if she has lost any time from work because of that injury but she did recall she "was put on light duty." The Employer has paid for that medical treatment, Claimant testifying that her low back symptoms are "the same" and "probably it hurts more than it used to," and she described these daily symptoms as a "burning" and "sharp pain." Dr. Terry Sawchuck, a specialist at The Spine Institute in Salt Lake City, currently treats her back problems. Claimant injured her left knee at the CDC when she "was allowed to go back to work after (her) right knee surgery... (and) was placed in the infant area where - - which requires a lot of kneeling and getting on the floor," and "since (she) couldn't use (her) right knee, (she) overused (her) left knee. And (she) was told that (she) tore the back of (her) kneecap." Claimant had not worked in the infant area previously and she has no idea why she was assigned to work there. She could not recall exactly when she told her Employer about that left knee injury but it could have been within one month or perhaps later. She did mention her left knee problem to Dr. Macey when she "went for follow-up appointments for (her) right knee." In June or July of 1996 Dr. Macey performed arthroscopic surgery on her left knee, and in February of 1998 and in April of 2000, Dr. Sorensen performed additional surgery on that knee. Claimant still experiences left knee problems, Claimant remarking that that knee is "not good," that she "cannot bend it," that "it's hard (for her) to walk. It's swollen. It's painful." She has been told to continue walking until the knee hurts and then she is to stop and rest. (CX 58 at 34-41)

At the CDC Claimant's supervisors were the Director and Assistant Director, Joyce DeChamplain and Josephine A. Nicholson, respectively. The CDC provided day care for pre-schoolers - - three-to five-year-olds," the children of military personnel stationed at Hurlburt Air Force Field. According to Claimant, her duties were as follows: "We had activities, played with them. We had - - we did a lot of things with them. The CDC was open from 6:00 a.m. to 6:00 or 6:30 p.m. and Claimant worked "full time, eight hours a day." In 1993 Claimant's hours were decreased to a minimum of twenty hours per week and a maximum of forty hours plus overtime as needed. "About 50 women" worked at the CDC and Claimant did receive some in-service training after she began to work there. Claimant "loved" her work at the CDC but it "became difficult to go to work" in May of 1993 when Virginia Green became the director. Claimant testified about the way she "was treated" by Ms. Green and "was embarrassed in front of parents and (her co-workers and children," that she "was called names," "was yelled at," "was

ridiculized (sic) in front of (her) co-workers and parents and children," and that such treatment "was an everyday thing." According to Claimant, such treatment also happened to "other co-workers," as well as to "the kitchen people and the front desk people" at the CDC. (CX 58 at 41-50)

Claimant last worked at the CDC in July of 1996 because in June of that year she experienced "shortness of breath" and her "arms and hands and face were tingling and numb" and she "felt pressure on (her) chest." A co-worker, Deanna Akers, came over to her and "saw that (Claimant" couldn't talk or move (her) mouth." This occurred around 10:00 a.m. and Ms. Akers "told (her) to go in (her) car and take some time" to rest. Someone "called 911" and "they took (her) to the emergency room in Hurlburt Field." She was administered oxygen at the clinic and she was released to go home to be with her children and parents. In July of 1996 Claimant filed the Form LS-201, alleging that her anxiety attack and stress problems were related to her work and her treatment by Ms. Green. According to Claimant, that treatment caused her to have premature labor contractions in October or November of 1993, prior to the birth of Veronica, and Claimant's OBGYN referred her to "a psychiatrist, psychologist" for counseling at a clinic in nearby Pensacola. Claimant left Florida in June of 1997 and moved to Utah to get away from that situation. Claimant talked to her supervisors about her treatment from Ms. Green and she had even asked her union for help. She even spoke to Colonel Kim Whitner, "The commander of MWR", but he was unable to provide any help. Claimant did testify that she was offered "work at the youth center across the street from the child care center" to provide care for the "older children" because her doctors had recommended a job change so that she would not be in a stressful situation. However, Claimant did not accept that job transfer because she would still be in close proximity to Ms. Green who spent "half of the time" there every day. (CX 58 at 50-64)

Claimant began treating with Dr. Richard Gremillion, a rheumatologist in nearby Sandy, Utah, in 1999 for "arthritis, pain, fatigue" on referral from Dr. Jeffrey Ayers, her primary care physician since 1997. She sees Dr. Gremillion once or twice per year; he prescribes pain medication for her and he has referred her to the "pain management clinic because of the severe pain" and because "he thought that (she) needed someone more specialized." In November of 1996 she applied for disability benefits from the Social Security Administration but the application was denied and she has appealed from that denial. She has not yet received a decision on her appeal. Claimant owns an automobile, has a valid driver's license but she "can't drive too far" because she "cannot sit for too long" as her "legs start tingling and (her) back hurts." She then has to stop the automobile, get out and walk around to alleviate

some of the low back pain. (CX 58 at 64-71)

Claimant admitted that while she still was at the CDC a removal action was instituted to remove her from her job, after she had her anxiety attack, "because of (her) mental health." She was not offered another job and was fired in February of 1997. She looked for work in the Florida Panhandle, was unable to find suitable work, left Florida and moved to Utah in June of 1997. However, in early 1997, prior to her move, she was involved in an automobile accident, "the right front part of the car" was damaged and the "other driver" was found to be at fault. The insurance company paid for the damage to her car and she sought medical treatment at the clinic in Fort Walton for the injury to her neck. She has looked for work in the Salt Lake City area but has been unable to find work within her restrictions. She has worked as a receptionist for her church from August of 1997 through May of 1999, at which time she "was released from work" because she had missed "a lot of work because of (her) depression." She began that job at $5.00 plus per hour and was earning $7.00 plus in May of 1999. She was originally hired to work full time but usually averaged 15 to 20 hours per week because of her depression. She has entertained "suicidal thoughts" in the past, especially "when things were pretty bad at work" at the CDC. She had no medical problems prior to going to work at the CDC and her current medication for her depression is prescribed at the Valley Mental Health. She has asked the State of Utah for vocational rehabilitation and job retraining but they are unable to provide assistance until her depression improves. She is being counseled by Robert Strachan, Ph.D., and others at Valley Mental Health and this counseling began in September of 1997. She currently sees a counselor there weekly. (CX 58 at 71-89)

Claimant's testimony before me at the hearing is contained in Volume One of the official hearing transcript at pages 43 through 125 and her testimony will be further discussed below.

Josephine A. Nicholson, who has worked at Hurlburt Air Force Field since 1976 and who was the Assistant Director at the CDC in 1989, testified that her primary duties were to run the CDC for the Director, Joyce DeChamplain, scheduling work hours, working with the parents, etc. Ms. Nicholson scheduled Claimant's work hours and she did exercise some supervision over Claimant, primarily making sure that she was at work as scheduled and in the correct classroom. In 1986 the CDC had thirty employees and each was afforded the opportunity of taking early childhood courses at a local community college. The Employer pays for those courses but Claimant did not take any of those courses. The CDC also provided in-house training. According to Ms. Nicholson, Claimant had migraine headaches quite often, usually every other week. She would then leave her

classroom and go to sit in a vacant darkened room or go home, and she "would still be on the clock" while in the room. In Claimant's absence another co-worker or Ms. Nicholson would have to cover that room. She knew that Claimant was upset because of her marital problems and her financial problems. She did recall that Claimant asked to be transferred to work at the front desk but as there were already two appropriated fund employees at the front desk, there was no need of anyone else. Claimant did work in the Headquarters building on light duty doing filing and other clerical duties. There is no written policy against off-duty employment and an employee can have outside employment as long as it did not interfere with their scheduled work. Employees were also encouraged not to babysit off hours the children of clients of the CDC but this policy was put in place only after the CDC learned that such off-hours work was taking place. Claimant was counseled that such babysitting was not such a good idea but **ex post facto**. (TR 252-272)

In May of 1993 Ms. Nicholson left the CDC and went to work as the Coordinator at the Family Child Center located in another building, and Ms. DeChamplain became the Assistant Director at the CDC. After Ms. Virginia Green "was bumped" at Eglin Air Force Base, she came to Hurlburt as the Director. Ms. Nicholson admitted that she did not have day-to-day observations of Claimant after May 17, 1993, that she learned from a number of other employees that Claimant was having personality problems with Ms. Green, that from 1989 to May 17, 1993 she provided input to Ms. DeChamplain who performed the Claimant's performance appraisals, that Claimant received a "very good rating" as of March 18, 1991, that her January of 1992 rating ranged from "very good" to "outstanding," that her October of 1992 rating ranged from "mostly outstanding" to "very good" and "satisfactory" and that her September of 1994 rating was done by Ms. Green. Ms. Nicholson agreed "for the most part" with those ratings, although she remarked that sometimes Claimant was not available for work or was out of the room when she was supposed to be there. However, she did not tell that to the Claimant directly. Ms. Nicholson could not understand why she was called as a witness because she had a good working relationship with the Claimant. While Ms. Nicholson did not write up Claimant, she did talk to Claimant verbally about her work. (TR 272-295)

Helena L. Wyche, who has worked at Hurlburt for twenty-two years, testified that as an IOPT (intermittent or part-time employee) for NAF, she was guaranteed from zero hours to 20 or 40 hours per week, that she became, after a series of promotions, a regular employee and was guaranteed 32 to 40 hours weekly, that she now is a supervisor in the infant room, that she tried to help Claimant as much as she could because of her knee problems, that she interacted with Claimant whenever Claimant worked at the CDC, that Claimant's personality was such

that whenever she saw something she believed to be not right, she would always have something to say about it and she would then proceed to show her co-workers how it should be done. Moreover, even if the Director told Claimant something, she would even object to the Director, Ms. Wyche remarking, "You either did things Maria's way or there would be a problem." (TR 295-303)

Claimant worked in various classrooms wherever and whenever she was needed but apparently she became claustrophobic while working in the temporary building (clinic) due to renovations and she was moved out of there. Sometime after 1993 Claimant began to complain of migraine headaches and she was out of work for a while because of her knee injury and she was put on light duty after her return to work. Each classroom has to be covered until the end of the day and the CDC would have to call upon someone else to cover the room. On September 9, 1996 Ms. Wyche wrote a memo to the file to document that she had spoken to Claimant on the telephone three days earlier, that Claimant had told her she was not returning to work and that she did not care to whom Ms. Wyche reported that fact. (CX 13) Ms. Wyche further testified that she often heard Claimant say that she did not want to be there at the CDC, that she did not really pay it much mind and that she did not ask Claimant why she did not want to be there. Ms. Wyche also testified that when Ms. Green arrived at the CDC the atmosphere changed and "things got much firmer" and "we had to focus on the kids," no more standing around and talking to each other, that there was that unwritten policy against babysitting children of clients during off hours, that all of the staff was informed about that unwritten policy, that she was not sure when Claimant did babysit the two children of one of the CDC's clients and that Maria Pauline Cassidy is Claimant's sister. (TR 303-320)

Ms. Wyche also admitted that Deanna Akers and other Hispanic employees had filed, sometime between 1994 and 1996, a grievance against her for alleged discrimination, that she has had such grievances filed against her by various individuals, that she was Ms. Akers' supervisor, that Ms. Akers "grieved just about anything I said to her or did to her," that at the union grievance hearing the union steward referred to the subject matter of the grievance as a lack of communication, that sometime in 2000 Ms. Akers apologized to Ms. Wyche for filing those grievances and stated that she should not have listened to others who forced her to do things against her will and that just the Thursday before the hearing held herein that Ms. Akers came into the children's room and told Ms. Wysche that she should not have listened to Ms. Smith and that Ms. Smith had used her. (TR 320-325)

One day in July of 1996 Claimant came to the CDC and she was

assigned to Room 14. She grabbed her chest and Ms. Wyche thought that she was having a heart attack and Claimant went into that dark closet. Ms. Wyche asked Claimant if she wanted someone to call her father and Claimant replied in the negative. Ms. Wyche then "buzzed up" the front office to Ms. Green and Ms. Green immediately came to that room at about 6:45 a.m., at which time there were perhaps 1 to 3 children in that room. Ms. Green talked to the Claimant and then brought her to the front office. Claimant was then put into a van and Ms. Wyche asked her if she wanted 911 to be called, and again the answer was in the negative. The ambulance arrived and Claimant was administered oxygen and taken to the nearby clinic at the field. Ms. Wyche denied ever hearing Ms. Green use profanity in talking to anyone at the CDC, Ms. Wyche remarking that Ms. Green worked five days each week plus overtime on Saturdays to do her paperwork and that she saw Ms. Green on a daily basis. When asked if Ms. Green had ever chastised Claimant in a public area, Ms. Wyche replied that once Claimant was seen still standing at her desk after she had complained of migraine headaches a short time earlier and Ms. Green asked Claimant why she was still there as she was supposed to be on sick leave and go home with her migraines. According to Ms. Wyche, there was a lounge area where employees could take their breaks and Claimant would go into that room to rest because of her migraines for an hour or two. Ms. Wyche did not know if Claimant was still on the clock while in that room and away from her assigned classroom. While Ms. Green did not "yell" at the staff, Ms. Wyche admitted that Ms. Green does always talk loudly. Ms. Wyche does recall Claimant once mentioned "a petition" about Ms. Green but Ms. Wyche neither read nor signed that "petition." Shortly after July of 1996 Ms. Wyche saw Claimant, Suzy Baker and Antoinette Williams having fun at Shipwreck Island, a waterpark. Ms. Wyche also wondered why she had been called as a witness herein. (TR 325-346)

Ms. Donna Love is now the Director of CDC as Ms. Green was transferred to South Carolina about three years ago. Ms. Wyche did talk to Ms. Green about Claimant's ability to work after her knee surgeries because the care givers have to be there to tend to the children and have to be able to get down on their hands and knees to attend to the children as necessary. Ms. Green suggested that Ms. Love talk to Jeanine Proctor at the HMO to see what could be done to deal with Claimant's work absences and her fitness for duty. Ms. Wyche wanted Claimant to return to work and that's why she called Claimant on September 6, 1996. (CX 3) Ms. Wyche also called Claimant's doctor but he refused to return her call, apparently because he did not want to become involved in a legal dispute. Claimant also circulated a petition for a microwave in the break room but Ms. Wyche, who agreed with the idea, would not sign the petition because she refuses, as a matter of principle, to sign any petition. (TR

346-377)

Ms. Virginia Green, who has worked for the U.S. Air Force for twenty-six years and who now serves as the Chief of Family Members at Ft. Pope in North Carolina, testified that in the 1990s Congress passed the Military Child Care Act, that that Act changed the procedures as to how child care centers were to be operated, that they had to be more than a babysitting service and had to provide an educational experience, that she was "riffed" from her position in Europe and was offered and accepted the CDC Director's job at Hurlburt Field because that job was in the same personnel series as her then current job in Europe. Ms. Green who arrived at the CDC in 1993 (TR 437), spent the first month at the CDC reading the pertinent regulations, going from classroom to classroom, observing the operation of the front office, etc. She also studied the Department of Defense (DOD) checklist as once a year the CDC is the subject of a "no-notice inspection" by the DOD. Ms. Green had a staff meeting within two (2) weeks of her arrival at the CDC and she told the staff about her philosohy as a Director, **i.e.**, "the children come first" and "we are there to serve them." Ms. Green is sure that she made changes at the CDC within the first six (6) months. She daily worked from 6:30 a.m. to 3:30 p.m and the CDC moved to its new facility in June or July of 1994. Ms. Green admitted that during her first week at the CDC she did have to discipline the Claimant after Ms. Green received statements from certain parents about Claimant. (RX 42 at 4) Ms. Green called Claimant to her office, showed her the two statements (**Id.**) and discussed them with Claimant as part of an informal counseling session, one that would not be placed in her official personnel file. Claimant told Ms. Green that she was pregnant with her second child shortly after she arrived at the CDC and had missed some work because of dizziness but Ms. Green could not recall Claimant's specific physical symptoms. (TR 407-426)

Claimant gave Ms. Green a doctor's note to the effect that she could not work outside but as the law requires that children go outside in the morning and in the afternoon, Ms. Green replied, "let me talk to others and see what we can do about it." While Ms. Green did not counsel Claimant for being pregnant, she did counsel her for excessive absenteeism, just as she does any other employee. Claimant was given light duty in the administrative office of the squadron but she does not recall when Ms. Romano, her supervisor, told her of that job transfer. The staff lounge had a rotary dial phone to permit calls during one's break and Ms. Green told all of the staff (1) not to use the front office phones to make personal calls because of the privacy concerns and (2) not to call a care giver out of the classroom unless it really is an emergency, Ms. Wynn remarking that some of the staff liked those policy changes and

others objected to those changes. Around 1995 or 1996 Ms. Green began to document Claimant's excessive absenteeism because her medical problems made it difficult for her to have her classroom covered. (RX 41 at 90-96) Claimant sometimes left her classroom without permission and Ms. Green does not like to see care givers walking in the hallways and not being in the room with the children. (RX 46 at 109-111) Ms. Green did give Claimant light duty work at the CDC for various reasons, including her knee problems (no bending or squatting), her back problems and because she once cut her finger in the kitchen. (RX 47) Claimant frequently requested training to work at the front desk but there already were two persons working there, and if there were a vacancy, that would have been part of the competitive service. (RX 47 at 2, 3; TR 426-435)

According to Ms. Green, Claimant did file an EEO complaint against her and Ms. Green was interviewed and gave a deposition as part of the investigation, and no discrimination was found and the complaint was dismissed. Claimant has filed several grievances against Ms. Green and Ms. Green denied using profanity at the CDC because that would be "highly unprofessional," especially as the CDC is a place for children. Ms. Green denied ever having a counseling session with the Claimant in public areas but she might have asked Claimant a question or two while she and Claimant walked around the CDC. Ms. Green's counseling sessions are held in her office and during those she tries "to remain calm," Ms. Green remarking that her staff does disagree with her at times, that she and Claimant did not have any shouting matches but then when Claimant becomes excited and exasperated, she does raise her voice. Ms. Green has driven Claimant home when she became dizzy and she may have driven Claimant to personnel to sign some papers. (TR 435-440)

Ms. Jay Weisz became Ms. Green's supervisor in 1996 when Gerry Romano left. She did talk to Ms. Weisz about relocating Claimant somewhere else at the Field and Mr. Weiza mentioned that there was a job at the Youth Center across the street. However, Claimant said that she would prefer to work elsewhere as she did not want to work for Ms. Green and because she did not want to work with children. Ms. Green is unable to see the Youth Center from her office but she admitted that from time to time she did go to that building to meet with the Staff Director for the Youth Center. Claimant refused to sign a form at her informal counseling session relating to her absenteeism and she was not accompanied to that session by a personnel person. (TR 441-450)

Ms. Green recalled the events that occurred on Claimant's last day of work when she experienced that anxiety attack and Ms. Green's testimony was fairly similar to that of Ms. Wyche.

I note Ms. Green testified that she arrived for work between 6:30 a.m. and 7:30 a.m., as is her usual custom. Ms. Green denied no access to a phone call to 911 and she disagreed with most of Claimant's allegations in her two page statement in evidence as CX 8. She did not tell Claimant to stay home or not to use the rest room during her pregnancy because that would be "highly inappropriate." She also did not harass Claimant in any way during her pregnancy. Ms. Green could not approve eight (8) weeks of maternity leave for the Claimant as she was on LWOP status and as she could approve only thirty (30) days. In fact, Claimant was afforded advance sick leave up to one (1) year to take care of her maternity leave. Ms. Green did not know if Claimant had financial problems while she worked at the CDC and she did not give Claimant a letter of reprimand for taking her daughter to a doctor in Pensacola. Ms. Green was aware that Claimant's doctor had imposed restrictions against squatting and kneeling because of her knee problems but Ms. Green was unable to abide by those restrictions because Claimant had to be able to kneel, squat and get down on the floor to be with and attend to the infants and children. Ms. Green talked to the HRO to see what could be done for the Claimant and she even talked to a Mr. Taylor at the Department of Labor but Ms. Green could not accept those restrictions as she did not have suitable adjusted work for her. (TR 450-460)

Ms. Green recalled the incident involving a child experiencing shortness of breath and she called for a training person who administered First Aid and she called 911 for the EMTs to take the child to the clinic. Ms. Green denied yelling at Claiant when she entered Claimant's room. Ms. Green does know Nora Torres and she was there at the CDC when Ms. Green arrived at the Center and when Ms. Green left the Center. Ms. Green testified that she had to make some changes in the work site of Ms. Torres and that those changes were not popular. Ms. Torres had been working forty (40) hours per week as a regular, GS-5 employee and her new job was part-time in the pre-school program. Ms. Green was "written up" for that change and she had ninety (90) days to correct that situation. Ms. Torres was not satisfied with her new duties but Ms. Green had no other alternative, and she received no direct feedback from Ms. Torres about that change. Ms. Green did talk to Claimant often about taking some early childhood courses to improve her situation but she wanted to take computer courses only, and Ms. Green could not pay for such courses unless she transferred to a job somewhere else at the base in a job where she had to use computers. However, Claimant took no early childhood courses and she never returned to work at the CDC after her last day of work in July of 1996. She never returned to talk to Ms. Green although she would sometimes see Claimant in the building and in the parking lot. She once saw Claimant in a restaurant and she had no idea when Claimant left Florida. Claimant is the type of

a person who freely speaks out on issues and she did so "many, many times." (TR 460-469)

Ms. Green did not know if Ms. Torres or Ms. Akers had filed EEO complaints against her but she did hear a "rumor" that they and the Claimant were going to file a class action against her. Ms. Green was contacted by the Air Force Legal Office and she was asked about the alleged discrimination based apparently on Claimant's "nationality." Ms. Green is not aware of most of the specific allegations made by them in that class action suit filed in February of 1997 but she did recall testifying at that EEO proceeding. When asked what kind of an employee was the Claimant, Ms. Green replied, "When she worked, she was very well" but for some periods of time there were "certain inconsistencies" when she was unable to work and as her absences become more frequent, then that became a problem for the CDC and for the parents. Ms. Green, however, was unable to rate the Claimant in one conclusory word, especially because of Claimant's frequent absences during her last year at the CDC and because she was not working at the end of the rating period. Ms. Green did admit that Claimant received an "outstanding" rating for earlier rating periods, that she did participate in sending to Claimant the October 4, 1996 Fitness For Duty memorandum (CX 4), that she and Ms. Wyche consulted with the personnel office prior to sending that memorandum and that Claimant advised that she was not returning to work at the CDC. RX 41 reflects Ms. Green's notes as to when she began to document Claimant's absences from work and she was unable to explain the gap between March 6, 1995 and January 6, 1996. (RX 41 at 9, 10; TR 469-483)

According to Ms. Green, a "formal" counseling can be either verbal or written and there is an entire system of progressive discipline; a verbal counseling is not memorialized by a written document and a letter of counseling or of reprimand is reduced to writing. There are other steps in the discipline process that are more serious and stringent, based on the issues and the pertinent sanctions, leading up to termination from employment. Ms. Green's several memoranda (RX 41 and RX 47) about her talks with the Claimant are simply meant to be informal and to document what took place at that particular point in time, Ms. Green remarking that she began to document Claimant's absences at the request of "J.C." in HRO sometime in 1995. Ms. Green found it necessary to make those changes when she became Director at the CDC because she wanted the CDC to manifest a children's environment and she wanted all of the staff to be "role models" for all of the children so that they can learn at that young and impressionable age the concepts of respect for elders, getting along with others, etc., and to avoid receiving complaints from parents, such as those received from the Gallegos and Sells' families. (RX 42 at 3, 4; TR 484-491)

According to Ms. Green, Claimant's attitude and behavior changed during her last six or seven months at the CDC, especially as Claimant frequently questioned policies at the CDC, Ms. Green remarking that some supervisors might interpret such questioning as a challenge to the supervisors' authority. She also admitted that, as of March 2, 1995, she had no problems with Claimant's work at the CDC. (RX 13) She also recalled the letter of reprimand for Claimant on March 6, 1996 from Ms. DeChamplain (RX 41 at 17) when Claimant, in violation of CDC policy, despite a prior specific warning because of her weakened knees (RX 41 at 17), stood on a step ladder to hang decorations in her classroom. She is aware that fifteen (15) of Claimant's co-workers signed a letter acknowledging that they had also stepped on that "cubby"[1] or step ladder for various reasons. Ms. Green testified that Claimant's anxiety attack occurred around 7:30 a.m. on July 8, 1996, that she (Ms. Green) arrived at the CDC at 7:05 a.m. and that she was called to Room 14 at 7:40 a.m. Claimant received a "presumptive satisfactory rating" for her last rating period at the CDC because she was out of work for too long a period of time. She believes that that rating is a mandate of the U.S. Air Force. Ms. Green admitted that she had an EEO complaint filed against her by a Caucasian worker in the late 1970s when she first started at Ft. Pope but that complaint was dismissed as having no merit. (RX 49; TR 491-513)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of credible witnesses, except as noted below, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its

[1]The "cubby" apparently is a three (3) legged step stool. (TR 500)

provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing

the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends, with reference to Claimant’s psychological problems, that she did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that she experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a)

presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not negate the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert.**

denied, 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999), **cert. denied**, 120 S.Ct. 40 (1999).

In the case **sub judice**, Claimant alleges that the harm to her bodily frame, **i.e.**, her bilateral knee problems, her lumbar disc problems and her psychological problems resulted from working conditions and/or her several injuries at the Employer's maritime facility covered under the Act. The Employer has introduced no evidence severing the connection between such harm to her knees and to her back and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm constitute work-related injuries, as shall be discussed below. However, with reference to Claimant's alleged psychological problems, the Employer has offered substantial evidence rebutting the statutory presumption in Claimant's favor. Thus, the presumption falls out of the case, does not

control the result and I shall now weigh and evaluate all of the record evidence with reference to that claim.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Janusziewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the

employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

I shall now discuss separately and resolve the three (3) claims before me.

A. RIGHT KNEE INJURY - MARCH 21, 1993

As noted above, the parties have stipulated, and this closed record establishes, that Claimant injured her right knee in the course of her covered employment on March 21, 1993, that the Employer had timely notice of such injury, that benefits were paid for temporary total and permanent partial disability for various periods, as is reflected on RX 50, that that document also reflects payment of certain medical bills (**Id.**) and that Claimant timely filed for benefits on September 6, 1994 once a dispute arose between the parties. (RX 17) The sole issue is the nature and extent of Claimant’s disability to her right lower extremity and that issue will now be resolved.

Claimant’s right knee injury was treated conservatively at first by Dr. Theodore I. Macey, an orthopedic surgeon (RX 11-21), but as the right knee problems persisted, the doctor recommended, and Claimant accepted, right knee arthroscopic chondroplasty surgery to repair a torn medial and lateral menisci; that surgery took place on August 23, 1994 (RX 10) and the parties have stipulated that Claimant reached maximum medical improvement on May 1, 1996 and that her average weekly wage as of the date of injury was $244.00.

As noted, Claimant suffered a work-related injury to her right knee in March of 1993. Claimant continued to perform her regular job following the knee injury. (TR 259) Claimant primarily treated with Dr. Theodore Macey for this injury. (TR 48) In late November 1994, Dr. Macey declared that Claimant reached maximum medical improvement from her knee injury and that she had a 21% impairment of the lower extremity. (RX 15-2) On the same day, he wrote that under the Florida impairment rating system, Claimant had a 15% impairment of the lower extremity. (RX 15-3) In April 1996, Claimant experienced a mild strain of her right knee that Dr. Macey determined needed no treatment. (RX 8) The parties agreed that on May 1, 1996, Claimant’s knee reached maximum medical improvement. (Tr 17)

Employer paid permanent partial disability compensation based on the 16% impairment rating. (Stipulations, TR 248) Claimant has continued to experience pain in her right knee, for which she sought treatment from Dr. Russell L. Sorensen in Utah. (RX 57 at 15, 17) Employer's surveillance videotape shows that Claimant still walks with obvious difficulty. (CX 62)

In the case at bar, Claimant seeks permanent partial disability for the injury to her right lower extremity, pursuant to Section 8(c)(2) of the Act, for the following reasons.

Claimant's right knee problems have also been treated by Russell L. Sorensen, M.D., and the doctor's opinions on the nature and extent of her disability are reflected in his July 17, 2001 deposition, the transcript of which is in evidence as RX 57. I note that the doctor testified forthrightly and persuasively on Claimant's current problems with her right lower extremity and that these opinions withstood intense cross-examination by Employer's counsel. In this regard, **see** RX 57 at 3-28) The doctor's treatment records are attached to the transcript as Exhibit 2 and the doctor's **Curriculum Vitae** is Exhibit 1.

As noted, the Employer paid an award of sixteen (16%) percent scheduled permanent partial disability for Claimant's right knee. This is presumably based on a chart note from Dr. Macey, Claimant's treating physician, dated November 28, 1994. (RX 15-3) However, Dr. Macey's notes for November 28, 1994 record two distinct ratings for Claimant's right knee. Dr. Macey's first chart note for November 28, 1994, indicates that Claimant's disability rating is twenty-one (21%) percent of the knee. (RX 15-2) A second note then indicates that, based on "the 1993 Florida Impairment Rating," Claimant has a sixteen (16%) percent impairment. (RX 15-3) As the state of Florida apparently employs a special rating system that precluded Dr. Macey from accounting for Claimant's full disability, such rating is irrelevant under the Longshore Act. It is clear that the full extent of disability as rated by the treating physician is twenty-one (21%) percent. That is the amount for which the Employer is responsible, and I so find and conclude. Accordingly, Claimant shall be awarded those benefits, as of November 28, 1994, based upon the stipulated average weekly wage of $244.00. (TR 16)

B. BACK INJURY - FEBRUARY 24, 1995

As also noted above, the parties have stipulated that Claimant injured her back in the course of her covered employment on February 24, 1995 (RX 22), that the Employer had timely notice of such injury (**Id.**), that benefits were paid for

temporary total disability for various periods of time, as is reflected on RX 50, that that document also reflects payment of certain medical bills (**Id.**) and that Claimant timely filed for benefits on June 25, 1998 (RX 23) once a dispute arose between the parties. The sole issue is the nature and extent of Claimant's disability to her lumbar area and that issue will now be resolved.

Claimant's lumbar problems have been treated conservatively by Dr. A. Craig MacArthur, an orthopedic surgeon, by a program of inflammatory medication, a weight reduction program and therapy (RX 24; CX 34) but as the symptoms persisted, Claimant was referred to Terry C. Sawchuk, M.D., at the Intermountain Spine Institute, and Dr. Sawchuk, who had "seen her for neck pain in the past," reports, in his May 13, 1998 Progress Note (CX 36), that Claimant "complains of a constant, aching, burning and stabbing pain in the low back," as well as "intermittent radiation into her right leg but this does radiate to the foot," and the doctor's impression was an "(a)ggravaton of chronic mechanical low back pain" as a result of her February 24, 1996 work injury and he continued her Ibuprofen and he "initiate(d) a patient active rehabilitation or physical therapy program." Dr. Sawchuk continued to see Claimant as needed and her May 27, 1999 nerve conduction studies were reported by Dr. Brent Bowen to be "within normal limits." (RX 26) Claimant's May 26, 1999 "NM Bone Image Whole Body" did show some abnormal findings "in the region of the left patella on the anterior images" (RX 27), as well as "increased uptake in the spine or right leg" (RX 29). Dr. Stephen Shultz has reported that Claimant's May 20, 1999 MRI of the lumbar spine was "normal" and that there was "(n)o evidence of disc herniation, spinal stenosis or foraminal narrowing" or "neural impingement." (RX 28)

As of June 3, 1999 Dr. Sawchuk suggested that Claimant continue (1) seeing Dr. Ashburn at the University of Utah pain management clinic and (2) the regimen of "taking Oxycontin and Lortab, Ambien and Neurontin." (RX 29) As of December 14, 1999 Dr. Sawchuk received complaints of continued "diffuse back pain and bilateral leg pain ... chronic in nature" and the doctor "stressed the importance of an active exercise program," "discussed an aquatic program and (he) encouraged her to pursue this." Dr. Sawchuk opined that he had nothing further to offer her and he released her to return to see him "on an as needed basis." (RX 29)

Dr. Sawchuk reiterated his opinions at his July 10, 2001 deposition, the transcript of which is in evidence as RX 56. Dr. Sawchuk testified forthrightly and his opinions withstood intense cross-examination by Employer's counsel.

The Employer has referred Claimant for an examination by an orthopedic surgeon at the Medical Consultants Network and Dr. Thomas Noonan, after the usual social and employment history, his review of Claimant's medical records, including diagnostic tests, as well as the physical examination, concluded as follows in his March 8, 2000 six (6) page report (RX 30):

"**DIAGNOSES:**

1) Chronic mechanical low back syndrome.

2) Acute lumbar strain, resolved.

3) Independent reported diagnosis of fibromyalgia and chronic fatigue syndrome.

"**DISCUSSION:**

Of the above diagnoses, I believe the only one attributable to the events of 1995 is that of a lumbar strain, which would be anticipated to have healed within six to eight weeks. The chronic nature of her complaints, I believe, is based upon mechanical as well as obesity and fibromyalgia.

The latter conditions have probably contributed to the fact that she is unable to perform heavy lifting activities, as well as stooping, lifting, bending or twisting. She does need to change positions frequently, but I believe she is capable of employment, up to eight hours a day," according to Dr. Noonan.

Shane VerVoort, MD, a specialist in physical medicine, rehabilitation and pain management, examined Claimant on February 1, 1996 and the doctor, after the usual social and employment history, his review of Claimant's "available" medical records and diagnostic tests and the physical examination, concluded as follows in his four (4) page **NEW PATIENT EVALUATION** (RX 32):

"**IMPRESSIONS:**

1) CHRONIC LUMBAR STRAIN SYNDROME.

2. LOW BACK PAIN SECONDARY TO NUMBER 1.

3. CHRONIC COMPLAINTS OF RIGHT KNEE PAIN SECONDARY TO TORN MENISCUS.

"DISCUSSION:

"Ms. Smith presents with persistent intermittent low back pain following two injuries to the low back (on November 30,

1994 and March 21, 1993) that have resulted in a chronic lumbar strain syndrome. There is no evidence of neurologic dysfunction or spinal dysfunction on the physical examination. I do feel that Ms. Smith might benefit from further therapy primarily directed towards reestablishment of normal lumbar range of motion and muscular flexibility. Prior physical therapy might not have directed exercises towards this goal, and therefore she has been asked to obtain the physical therapy records so I might review them and determine whether or not further therapy is indicated. I do feel that Ms. Smith is able to continue her present work without restrictions but is not yet at maximum medical improvement. I will see her back in a few days when she will bring the physical therapy notes, and at that time we will most likely provide a prescription for therapy and then subsequently see her back after she has begun therapy," according to the doctor.

As of January 28, 1999 (?) Dr. MacArthur issued a work restriction slip allowing Claimant to do intermittent sitting, walking, lifting, bending, squatting, climbing, kneeling, twisting and standing for up to 8 hours per day. The doctor imposed a lifting limit of 10-20 pounds and he opined that Claimant had reached maximum medical improvement and that she "will need vocational rehabilitation services such as testing, counseling, training or placement to return to work." (RX 31)

As of December 7, 1998 the Employer's worker's compensation adjuster, advised the Office of Workers' Compensation Program, that the "employer is withdrawing notice of controversion dated September 21, 1998 to the back only on the above-captioned Claimant." (RX 33)

Dr. VerVoort states as follows in his October 28, 1996 follow-up note (CX 27):

"Ms. Smith attempted work last week by soldering small electronic equipment but the job required constant sitting and stooped positions at the work bench. She states that within four days of performing these duties, she was experiencing a severe increase in low back pain and the development of mid-back stiffness and pain. She had to discontinue the work as a result of the pain. She asks that I address her full work restrictions so that she might pursue options for retraining. She continues to have chronic aching low back pain intermittently sharp in nature especially with extension and rotational movements. She has previously been restricted from any lifting over 20 lbs., and she should avoid any repetitive bending or twisting at the waist. It is also my opinion that she should not sit for more than one hour at one time or over five hours in an eight hour day. She should be allowed at least ten minutes of standing in between her periods of sitting. She should not stand for more

than thirty minutes at one time or for more than three hours in an eight hour day. She should avoid any activities of a prolonged nature above her shoulder height. She also has work restrictions imposed by Dr. Macey regarding her knee injury. That involves no squatting, stooping or kneeling. She should not climb ladders nor should she work at unprotected heights. Ms. Smith is able to work in a light duty capacity, but ideally any job should allow her to stand and move about as needed or sit when necessary after she has been standing for a while. Ms. Smith continues to use Motrin on an intermittent basis for management of her symptoms. She is to return on an as-needed basis," according to the doctor.

Claimant's official duties as a child development program assistant are to provide child care or educational/recreational services to children and/or Youth; she participated in a variety of activities, **i.e.**, classroom instruction and activities, arts and crafts, outdoor activities, field trips, etc.; she set up and cleaned play and activity areas. The functional requirements of her job are specifically detailed in 35 components listed on the United States Civil Service Commission Certificate of Medical Examination, a document in evidence as CX 28.

With reference to Claimant's February 24, 1995 back injury, her injury can be considered permanent if she has any residual disability after reaching maximum medical improvement. **Trask v. Lockheed Shipbuilding Construction Co.**, 17 BRBS 56, 60 (1980). Employer agrees that Claimant's 1995 back injury is related to employment. (TR 13) This condition has been described as chronic lumbar strain syndrome. (RX 32-3) Claimant reached maximum medical improvement on October 28, 1996. (Stipulation, TR 13) On the date Claimant reached maximum medical improvement, Dr. Vervoort described chronic aching low back pain. (CX 27) Claimant has continued to experience this chronic low back pain. (CX 34, 36, 40; RX 24-4, 25)

Several years later, in an exam requested by the Employer, Dr. Noonan attributed Claimant's ongoing back pain to her weight and fibromyalgia. (CX 53) However, Claimant's weight problems are not new. Plaintiff's treating doctors, more persuasively, describe weight as only part of the equation. (RX 24-4; RX 56 at 6, 7, 30) They are entitled to deference on this question. **See, e.g., Pietrunti**, 31 BRBS (CRT) at 89. It is irrelevant that Claimant's weight may contribute to and aggravate her back problems. If an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS

142 (199); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Employer is responsible for the entire back disability.

Section 8(c)(21) provides the formula for determining unscheduled permanent partial disability:

> "In all other cases of this class of disability the compensation shall be 66 2/3 per centum of the difference between his average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability."

In assessing Claimant's residual earning capacity, consideration must be given to the Claimant's age, education, industrial history, and the availability of employment he or she can perform after the injury. **White v. Bath Iron Works Corp.**, 7 BRBS 86, 91-92 (1977), **aff'd.**, 584 F.2d 569 (1st Cir. 1978).

On the date Claimant reached maximum medical improvement, Dr. Vervoort described her restrictions related to her back as: an inability to lift more than 20 pounds, a need to avoid repetitively bending and twisting, a need to avoid sitting for more than one hour at a time and standing for more than thirty minutes at a time, and a need to avoid prolonged activities above shoulder height. (CX 27) He also explained that any job should allow Claimant to "stand and move about as needed." (CX 27)

The record shows that Claimant's restrictions related to her back have resulted in a loss of wage-earning capacity. Claimant's job at the time of her injury is unavailable because she was terminated. This must be taken into account in considering whether Claimant can return to her regular employment. Thus, she established a **prima facie** case of total disability, and the extent of such disability will be further discussed below.

C. ALLEGED PSYCHOLOGICAL/STRESS CLAIM

Initially, I note that the Employer has challenged Claimant's credibility with reference to her testimony and actions herein. However, I found Claimant to be a credible witness, noting that she, as well as others at the CDC, experienced rather harsh and severe treatment from Ms. Green, and that any communication problems result from her limited education and language skills. Claimant's credibility will be further discussed below.

As noted above, Claimant has alleged that her employment at the CDC and the disparate treatment that she received there has resulted in psychological problems diagnosed as depression causing her to stop working on July 8, 1996 after she experienced an anxiety attack on that date while working in Room 14. The Employer submits that those alleged emotional problems are not work-related, that such problems are the result of certain lifestyle choices she has made and her domestic and marital problems, that she has full capacity to return to work full-time, that she was offered suitable adjusted work away from Ms. Green and that refused such job transfer.

Claimant's medical records reflect that Claimant, upon referral from her OBGYN, sought counseling for her emotional problems at the Bridgeway Center on October 7, 1993 and her twelve (12) page progress notes for such sessions are in evidence as CX 16. I note that the last entry is dated July 11, 1996. (CX 16 at 12)

Dr. Theodore D. Laughlin, Claimant's OB/GYN, in his July 22, 1996 disability slip, stated that "do (**sic**) to stress and anxiety related to present employ, the above should be transferred to a different situation." (CX 24) As of September 5, 1996 Dr. Laughlin opined that Claimant "cannot work at previous job location due to psychologic problems." (CX 26)

Gregory W. Ellis, M.D., P.C., a specialist in psychiatry and neurology, states as follows in his December 5, 1997 report (CX 30):

"To Whom it may concern;

"I am writing you in regards to Ms. Lorena Smith. I have been working with Ms. Smith throughout the past four weeks in order to assist her in developing a comprehensive medical and mental health treatment plan. During this time she has worked intensively with me to establish a variety of positive coping skills. In addition, she has utilized a number of treatment resources including but not limited to inpatient care (Olympus View Hospital), outpatient care (LDS Social Services, South Valley Mental Health Unit Services, etc.) and twenty-four hour crisis services (University Neuropsychiatric Institute, Adult Residential Treatment Unit, and Olympus View Hospital).

"She is currently enrolled in the South Valley Mental Health Care Unit. She is receiving ongoing medical health care via Dr. Jeffrey Ayers. She utilizes these resources in order to assist her in managing her current health care needs. I am no longer providing her psychiatric care, as she has now developed and maintained successful compliance with these treatment resources.

"I hope that this letter will serve to illustrate the many positive efforts that Ms. Lorena Smith has undertaken in a relatively short time in order to improve her mental and medical health care. She has been successfully focused on developing alternative effective means of coping with her depression and in generating a readily available health care team which is now fully established," according to Dr. Ellis.

As of that date, Dr. Ellis requested for Claimant "a medical leave of absence from all of her work duties until ½/98" (CX 31)

Three (3) days later Dr. Ellis sent the following letter to Claimant (CX 32):

"I am writing you in regard to your recent successful efforts in fully involving yourself in the South Valley Mental Health Care System. I am happy to learn that you have established yourself as a South Valley Health client. I understand that you will have your first medication management appointment with South Valley on Monday, December 8, 1997 at five o'clock p.m. You have informed me that your initial individual therapy appointment at the South Valley Unit will be the next day, Tuesday, December 9, 1997. I too have confirmed with the South Valley Unit staff that you are established as a client at that unit.

"I am also happy to learn that you have been utilizing the variety of crisis services available through the Valley Mental Health system (ARTU 483-5444), Olympus View Hospital system (272-8000), University Neuropsychiatric Institute (583-2500) and of course the 911 system.

"I was pleased to learn at our December 5, 1997 appointment that you are not neglecting your medical health. I understand that you are continuing with your medical care via Dr. Jeffrey Ayers and his medical team. You have informed me that they are actively working with you to address your medical health care at this time.

"As you requested at our last meeting, I have composed a letter relating your intensive efforts to establish a comprehensive mental and medical health care team. This letter is available for you to pick up as early as Monday, December 8, 1997. I would like to thank you for all of the work you have done with me over the past five weeks. I am gratified to know that you have established a viable health care team. I will no longer be proving (sic) you any psychiatric or medical health care; but will assume that these health care needs will be attended to via the health care resources which I have listed above. I wish you well in all of your future endeavors," according to Dr. Ellis.

Jeffrey A. Ayers, D.O., issued the following report on December 8, 1997 (CX 33):

"Lorena Smith has been under my care for several months.

"She has suffered from major depressive disorder and generalized anxiety. Has been seen on multiple occasions in our office for that problem and subsequently referred to psychiatric services for more intensive therapy. The patient has done relatively well, but still has some adjustments to be made in her life and her emotional status.

"I have, on one occasion, observed this patient interact with her children and seems to have been a positive loving experience and from my understanding of this patient and her situation, do not feel that she is likely to have caused them any abuse physically or sexually," according to the doctor.

At the Employer's request, L.J. Schmidt, M.D., saw Claimant at the University of Utah Neuropsychiatric Institute and the doctor administered the Beck Inventory and other tests, reviewed Claimant's medical records and several witness statement. In his ten (10) page September 2, 1998 report, Dr. Schmidt concludes as follows (RX 38 at 8-10):

"Based upon the information I could gather, Ms. Smith was clinically unaffected until 1993, a time when she identifies a change in management at the Hurlburt Child Development Center where she worked. She enjoyed her work as a child development assistant from 1989 until 1993, recalls good supervisory reports, and has pride in the importance of that work. Within months of the change in directorship of that facility, she first sought mental health assistance because of emerging anxieties symptomatology. In both the 1993 and 1996 episodes of care at the Bridgeway Center, the character of her complaints and the focus of her distress were consistently reported. Indeed, the symptom picture and the nature of her fears remain essentially unchanged from that date.

"She has developed a deep distrust of authority figures, particularly supervisory authority in the workplace, fearing that such persons will ridicule and demean her. This was evident in her difficulties in opening herself to my scrutiny for this evaluation. Rarely have I encountered a patient with so much anticipatory dread. In the initial few moments of our exchange, she appeared terrified that I might mistreat or misjudge her. During the course of our interview, that tension gradually relaxed and she was able to describe what she knows are irrational fears when she is subject to supervisory or evaluative scrutiny by others who hold authority. Ms. Smith appears to lack an adequate array of defense mechanisms to

protect herself in situations she finds socially denigrating. moreover, it would appear, this picture has developed in the context of the last three years of her job at the Hurlburt Child Development Center. When I had a moment to speak to her present supervisor who accompanied her from the rehabilitation setting where she currently works, I was told that she is a good worker but one who lacks confidence and requires a lot of interpersonal support and sensitivity in the way she is given feedback about her performance.

"I reviewed the witness statements which described the differing viewpoints of the incidents occurring in the workplace at the Hurlburt Child Development Center. **There is an obvious conflict about who did what to whom. I felt it beyond the scope of my competence to judge which statements represented the events as they transpired.** (Emphasis added)

"RESPONSE TO SPECIFIC QUESTIONS:

1. Are the presenting symptoms directly related to the on-the-job injury?

> Since the Symptoms developed in the context of her last three years at the Hurlburt child development Center, the answer is 'yes'.

2. In your professional opinion, do the injured worker's symptoms preexist the compensatible injury?

> The clinical history and supporting documents from the Bridgeway Center suggest that the patient's symptoms developed in the context of her employment. I could not find preexisting evidence indicative of her diagnoses before then.

3. In your professional opinion, is the patient able to perform her usual occupation per the job description? If not, please indicate restrictions and approximate date the injured worker will be able to return to work.

> The central issue in this patient's clinical picture is her profound social phobia in work contexts. She has insight into the relationship between the interactive triggers which might be provoked by supervisor's attitudes and behaviors, and her own symptomatic responses. She currently lacks the confidence to re-challenge an unsheltered work environment. Her current new assignment as a job coach to other, may be expected to provide her with further readiness. Therefore, the challenge should be postponed for several more months. It would also be

helpful to make this determination with the assistance of her current sheltered employment supervisory structure.

4. Considering the present status, has the employee reached MMI? If not, when do you anticipate MMI?

The patient remains symptomatic despite continuing treatment. Her level of depression and the intensity of her social phobia will require further treatment. I would expect her return to a satisfying and productive work environment to contribute substantial benefit to her symptomatic improvement. I do not have sufficient information to estimate how long this will take," according to Dr. Schmidt.

Dr. Schmidt reiterated his opinions at his July 31, 2000 deposition and the transcript thereof is in evidence as CX 59. Noteworthy is Claimant's denial of "any significant stresses in her early life experiences." (CX 59 at 12) According to Dr. Schmidt, Claimant manifested "indications of anxiety" as early as October of 1993 and she did miss some work because of that problem and her then pregnancy. (CX 59 at 16-17) Claimant told the doctor that her problems at work began in October/November of 1993, "that her fears of negativism in the workplace were not going to get any better," that she last worked there on July 8, 1996, because "she couldn't take it anymore" and that she moved to Utah in June of 1997. (CX 59 at 18-19) Claimant also told the doctor that in 1998 "she was working for the LDS church in a somewhat protected environment in which a number of persons who are having trouble with competitive employment are utilized to accomplish Church work and services that they ... support" and that she "had just been moved to the role of a job coach, which means she'd been promoted, and we were hopeful that that might inspire her sense of confidence for future performance." (CX 59 at 19-20)

According to the doctor, Claimant's fears of rejection did not predate her employment at Hurlburt Air Force Field. (CX 59 at 20) Claimant's work absences were due either to her pregnancy complications and later on to her migraine headaches, as well as her "orthopedic problems with both knees." (CX 59 at 24) Dr. Schmidt agreed that Claimant's marital separation in 1993 and her divorce one year later were "terribly stressful" and were "an essential focus in her mind in terms of what she had to contend with." (CX 59 at 25) The doctor opined that Claimant's Beck Mood Inventory showed a significant level of depression," that her "score is 25" and "anything above the level of about 15 gives us concern for clinical management," that he "considered her actively depressed, based upon that scale score" as he "found similar signs of that in (her) mental status and interview," that she was "moderately obese" for a

woman of her height of 5'4" and that her weight “certainly could have contributed to difficulties with her knees” and that her shortness of breath and feelings of light-headedness or faintness or dizzy spells “were associated with periods of heightened anxiety.” (CX 59 at 32-33)

The ten (10) page **Curriculum Vitae** of L.J. Schmidt, M.D., is in evidence at CX 59 at 43-52 and I note that the doctor, since January 1996, has been Medical Director, University of Utah Neuropsychiatric Institute, and, since July of 1995, has been Vice Chair for Clinical Services, Associate Professor of Psychiatry (tenured), Department of Psychiatry, University of Utah School of Medicine, Salt Lake City, Utah. (CX 59 at 43)

Harold M. Ginzburg, M.D., J.D., M.P.H., Metairie, Louisiana, examined Claimant on May 2, 2001 and the doctor, after reviewing Claimant’s medical records, the deposition testimony of Dr. Schmidt (CX 59), her employment records and her deposition testimony (CX 58) and the pertinent information gleaned from the psychiatric evaluation and tests performed at the doctor’s office, concluded as follows in his twenty-two (22) page report (RX 55 at 19-22):

Discussion

Ms. Smith is a Chilean born woman whose family moved to the area around the United States Air Force (USAF) Base located near Torrejon (near Madrid), Spain. She indicates that she met her former husband, an enlisted man in the USAF and married him. She relocated to the United States with him. She reports that they had one child, and she worked on the base at the day care center located there. She notes that she separated from her husband, and then, while separated, became pregnant with her second child by an individual who was not her husband. She notes that she developed difficulties with the pregnancy and had to be sent to a high-risk pregnancy clinic located one hour from the base. She states that during this time she had conflicts with her work supervisor - Virginia (Green).

Ms. Smith states that she sustained a knee injury, at work, but did not report that injury immediately after it occurred. She states that “everyone” who worked at the day care center did not like Virginia and that this was especially true of the Hispanics. She indicates that they wanted to have a class action suit against her but there were not enough Black employees to support this action.

Ms. Smith states that she filed a number of complaints against Virginia and that her union helped her do this. She states that she had a second injury, to her back, when she was reassigned to work with the infants rather than the 3-5 year olds.

Ms. Smith indicates that she decided to come to Salt Lake City to start all over and became angry that she had to live in her van until housing could be arranged. She states that the vehicle was eventually repossessed. Ms. Smith remains in counseling therapy. She no longer receives her medication from the mental health clinic. (**See** Dr. Week's office notes from Valley Mental Health.) Ms. Smith reports that she receives all of her medication from the Pain Management Program at University Hospital. She stated that she was unaware of the diagnoses rendered by Dr. Weeks.

Ms. Smith reports that she is disabled by her fibromyalgia and cannot perform any activities without her narcotic and amphetamine. She indicates that the anti-depressant medication does not appear to be helping her. She notes that she has always been obese and loses weight during pregnancy. She indicates that her current weight, of approximately 300 pounds, was also her weight when she was employed at the daycare center. She states that she has always been obese, since childhood, and has used appetite suppressants, including amphetamines, Phen-Fen and other over-the-counter medications without success (**see** above).

Ms. Smith's emotional volatility at the time of her employment, during her pregnancy with her second child and subsequently, including the present time, to a medical degree of certainty, may be accounted for by her use of diet suppressant / psychostimulant medications as noted above. Attached to this report are copies of the package inserts for some of the diet suppressant medications.

Ms. Smith's current mental status may be accounted for, in significant part, by her current medications that include narcotic, amphetamines, anti-inflammatories, hypoglycemic agents, diuretics, and anti-depressive medications, among others.

Narcotics are central nervous system depressants and therefore are associated with depressive symptomatology. Fibromyalgia is frequently associated with mood alterations. Significant blood sugar alterations requiring hypoglycemic agents can be associated with alterations in mood. Drug interactions are known to exist between and among the pharmacological agents she is being prescribed. **See** the drug interaction attachment to this report.

Ms. Smith's use of Fen-Phen may have caused her physical harm. There are specific warnings about the use of Fen-Phen and Imitrex and antidepressants. It appears that her treating physicians, at that point in time, were not aware of all her medications and therefore did not advise her about the known

drug interactions and toxicity, specifically mental health difficulties. **See** attachment 2 for a specific listing of these known problems. Certainly, her recorded behaviors, during this period of time, mid-1996 - mid-1997 can be attributed to these drug–drug interactions. The interactions of her current medications can also be contributing to her mental health difficulties. This certainly would account for the reason that she has been non-responsive to the following psychoactive medications: Trazodone, Imipramine, Prozac, Wellbutrin, Paxil, Buspar, Zoloft, Celexa, Remeron and Neurontin. These medications are representative of almost all the classes of antidepressant medications.

There does not appear to be any psychiatric conraindication to her returning to work. Her principal reported difficulty is that she is concerned that any new supervisor will act in a manner similar to the manner in which she perceived Virginia to act towards her. Ms. Smith does not have an insight in to how her changing marital status, her pregnancy out-of-wedlock, her prenatal difficulties, her obesity, and her long-term use of psychoactive diet suppressant agents may have contributed to her work-related difficulties. Ms. Smith does not appear to accept any responsibility for or contribution to her reported work-related difficulties and does not believe than any accommodation was rendered to her.

While Ms. Smith appears to be genuinely unhappy in her current life-style, she expects others to help her improve her qualify of life rather than her taking a more active role in her own transition into the community. Now that she has been approved for social security benefits, and is already receiving food stamps and child support, for her older child, her motivation would seem to be even less for her to re-enter the work force.

Her use of mental health services, at this point in time, appears to be focused on her current life issues. When she has confrontation with a mental health professional, she stops treatment or seeks an alternative health care provider. Again, Dr. Week’s notes, and other clinicians at the Valley Mental Health facility are most striking in this regard.

Ms. Smith has a history of using multiple physicians to provide multiple medications that are often not known to other evaluators and health care providers. Ms. Smith’s pre-incident-in-question medical and social history of obesity from adolescence and before, use of psychostimulants for diet including Fen-Phen, and the manner in which her daughter was conceived have not always been appropriately or completely shared with her clinicians and evaluators. The Valley Mental Health facility staff’s notes document her inability to accept constructive criticism. Rather than working on therapeutic

issues, she disengages, avoids and changes therapists. Multiple therapists have rendered a diagnosis of a personality disorder. This is a life-style manner of dealing with stress. Certainly, a separation from an active duty military husband, while working on a military base, and during the separation becoming pregnant during a single contact with an individual known only by a first name, can be reasonably expected, to a medical degree of certainty, to be stressful and of sufficient magnitude to interfere with other activities including employment. Being a pregnant separated single mother, working in a childcare facility, appears to have provided Ms. Smith the opportunity to direct her frustrations at her supervisor rather than accept responsibility for her own actions. Ms. Smith created her own stressful environment by becoming pregnant under the circumstances in which the pregnancy occurred and in the context of her underlying medical history of migraine headaches, obesity and the use of psychostimulants. Psychostimulants used for diet control are known to cause irritability to the point of irrationality. Ms. Green or any other supervisor cannot be expected to have been aware of Ms. Smith's use of prescription weight reduction medications, including Fen-Phen, and their associated pathological side effects of cardiovascular disease and emotional instability.

Ms. Smith stated that "no one" like or respected Ms. Virginia Green and "all" wanted her removed. If there is information that is contrary to Ms. Smith's dichotomous statement, then her perception of the events that led to her termination must be considered to be significantly distorted and self-serving.

The mental health interventions appear to have occurred after the initial EEO complaints were not found for Ms. Smith.

Dr. Schmidt renders his diagnoses based upon the information provided to him by Ms. Smith; however, he renders the following important caveat:

> **I reviewed the witness statements that described the differing viewpoints of the incidents occurring in the workplace at the Hurlburt Child Development Center. There is an obvious conflict about who did what to whom. I felt it beyond the scope of my competence to judge which statements represented the events as they transpired.** (Emphasis added)

This statement reflects the difficulty any single evaluator encounters in these matters. However, additional records and history, from Ms. Smith and other sources, render her veracity in question.

Based upon a review of the above-cited medical and other records and my evaluation of Ms. Smith, to a medical degree of certainty, I cannot attribute her present medical or emotional problems to her reported ongoing work-related difficulties with Virginia Green. There are just too many other concurrent and intervening factors to attribute her present mental health status solely to work-related incidents while employed at the day care center in question, according to Dr. Ginzburg.

Dr. Ginzburg, who sat in the courtroom and listened as Claimant testified before me at her hearing, reiterated his opinion that Claimant's depression is not due to her employment with this Employer, that he has given little weight to the opinions of Claimant's doctors because they are based on incomplete and inaccurate information given to the doctors, that Claimant's emotional problems are actually due to the poor choices she has made in her life events and the side effects and interaction of the medications that she is taking for her emotional and orthopedic problems, that her suicidal attempts have occurred here in Utah and far removed from Florida and Ms. Green, that she can return to work, if properly motivated, to her former job with the Employer and that she has no psychotic disability that would prevent her return to work. According to the doctor, Claimant perceives all of her problems as due to Virginia Green but Claimant refuses to accept any responsibility for her actions; she has very little motivation to return to work as she has been approved for Social Security Administration disability benefits, and she also receives $260.00 per month in food stamps; she contributed to her stressful environment by her domestic/marital problems, by her pregnancy and complications therefrom, her other underlying medical problems and especially her longstanding use of diet medication, including Fen-Phen. Dr. Ginzburg further testified that even Dr. Schmidt realized the limitations of his report by adding that important caveat noted above and that his opinions (**i.e.**, Dr. Ginzburg) are entitled to more weight because he has had the benefit of reviewing more medical records than did Dr. Schmidt.[2] (TR 125-143)

According to Dr. Ginzburg, Claimant has taken as many as seventeen (17) medications over the years and the doctor consulted the **Physicians Desk Reference (PDR)** and concluded that some of her medications do not mix and sometimes their interaction causes side effects that are additive. Migraine headaches are both a symptom and a disease and obesity is a symptom until it interferes with one's daily living and then it

[2]I note that Dr. Schmidt is the Employer's initial psychiatric expert and the doctor reviewed those records sent to him by the Employer.

becomes a disease. While the doctor did not know how much Fen-Phen Claimant took during those nine (9) months, he did say that it comes in one dosage - 50 mg - and that its use did contribute to her emotional problems; while Fen-Phen may cause cardiovascular problems, he has not seen any such problems in Claimant's medical records. While Dr. Schmidt also used the Beck Inventory test, Dr. Ginzburg's testing was much more exhaustive and while her bilateral knee problems did contribute to her depression, he did not know whether her lumbar problems were contributing or affecting her depression. In response to cross-examination, Dr. Ginzburg admitted that Claimant cannot return to work for Virginia Green because Claimant believes that Ms. Green presents a hostile work environment, that alternate employment sites are indicated herein and that she could return to work for the Employer at her prior job as long as Ms. Green is not employed at Hurlburt Air Field. According to the doctor, Claimant certainly has misperceived and distorted the events surrounding her relationship with Ms. Green as Claimant has "an absolutist" view of Ms. Green and refuses to acknowledge that others may not agree with her (Claimant), and she has changed therapists whenever they do not agree with her. Eighty (80%) percent of the doctor's practice is evaluating patients in a clinical setting and he has testified both for Plaintiffs and Defendants in civil and criminal cases. (TR 143-239)

Dr. Ginzburg's **Curriculum Vitae** is in evidence as RX 54 and totals 28 pages.

While Dr. Ginzburg attributes Claimant's medical problems to her multiple medications and their interaction, such as her use of Fen-Phen, the fact remains that that medication has been prescribed for her various medical problems, some of which are work-related. The Employer, in my judgment, is responsible for any consequences that may have resulted from the interaction of the medication prescribed for her. I also note that the July 8, 1997 FDC Public Health Advisory regarding Fen-Phen, in evidence as RX 60, contradicts Dr. Ginzburg's assumption that Claimant must have used Fen-Phen near the time of her July 7, 1996 anxiety attack because of his belief that "this particular drug was not initially approved until April 29, 1996."

Timely Notice of Injury

Section 12(a) requires that notice of a traumatic injury or death for which compensation is payable must be given within thirty (30) days after the date of the injury or death, or within thirty (30) days after the employee or beneficiary is aware of a relationship between the injury or death and the employment. In the case of an occupational disease which does not immediately result in disability or death, appropriate

notice shall be given within one (1) year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship among the employment, the disease and the death or disability. Ordinarily, the date on which a claimant was told by a doctor that he had a work-related injury is the controlling date establishing awareness, and a claimant is required in the exercise of reasonable diligence to seek a professional diagnosis only when he has reason to believe that his condition would, or might, reduce his wage-earning capacity. **Osmundsen v. Todd Pacific Shipyard**, 755 F.2d 730, 732 and 733 (9th Cir. 1985); **see** 18 BRBS 112 (1986) (**Decision and Order on Remand**); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); **Cox v. Brady Hamilton Stevedore Company**, 18 BRBS 10 (1985); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Stark v. Lockheed Shipbuilding and Construction Co.**, 5 BRBS 186 (1976). The relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. **Thorud v. Brady-Hamilton Stevedore Company**, 18 BRBS 232 (1986). **See also Bath Iron Works Corporation v. Galen**, 605 F.2d 583 (1st Cir. 1979); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981).

Although the Employer did not receive written notice of the Claimant's injury or occupational illness as required by Sections 12(a) and (b), **i.e.**, by the filing of the Form LS-201, the claim is not barred because the Employer had knowledge of Claimant's work-related problems or has offered no persuasive evidence to establish it was prejudiced by the lack of written notice. **Sheek v. General Dynamics Corporation**, 18 BRBS 151 (1986) (**Decision and Order on Reconsideration**), **modifying** 18 BRBS 1 (1985); **Derocher v. Crescent Wharf & Warehouse**, 17 BRBS 249 (1985); **Dolowich v. West Side Iron Works**, 17 BRBS 197 (1985). **See also** Section 12(d)(3)(ii) of the Amended Act.

Claimant’s last day of work was on July 8, 1996, at which time she experienced her anxiety attack. The Employer had actual notice of such attack and as I have concluded that Claimant’s emotional problems, diagnosed as depression, constitute a work-related injury, the date of her injury is July 8, 1996, and I so find and conclude.

This Administrative Law Judge, in concluding that Claimant’s psychological problems do constitute a work-related injury, has placed greater weight on the medical evidence presented by the Claimant, **i.e.**, that of her treating physicians and that of Dr. Schmidt, the psychiatrist initially selected by the Employer to evaluate the Claimant. The Employer apparently was not pleased with the doctor’s report and then had Claimant examined by Dr. Ginzburg. However, that latter opinion is entirely litigation-

oriented and I have given it little weight. In accordance with **Pietrunti, supra**, and **Amos, supra**, I have accepted and placed greater weight on the opinions of Claimant's treating physicians, as well as Dr. Schmidt.

The Employer's reliance on **Marino v. Navy Exchange**, 20 BRBS 166 (1988), to justify its personnel actions is entirely misplaced as **Marino** is clearly distinguishable based upon the facts of this case and Claimant's treatment by Ms. Virginia Green.

Statute of Limitations

Section 13(a) provides that the right to compensation for disability or death resulting from a traumatic injury is barred unless the claim is filed within one (1) year after the injury or death or, if compensation has been paid without an award, within one (1) year of the last payment of compensation. The statute of limitations begins to run only when the employee becomes aware of the relationship between his employment and his disability. An employee becomes aware of this relationship if a doctor discusses it with him. **Aurelio v. Louisiana Stevedores**, 22 BRBS 418 (1989). The 1984 Amendments to the Act have changed the statute of limitations for a claimant with an occupational disease. Section 13(b)(2) now requires that such claimant file a claim within two years after claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have become aware, of the relationship among his employment, the disease, and the death or disability. **Osmundsen v. Todd Pacific Shipyards**, 755 F.2d 730 (9th Cir. 1985), and the Board's **Decision and Order on Remand** at 18 BRBS 112 (1986); **Manders v. Alabama Dry Dock & Shipbuilding**, 23 BRBS 19 (19889). Furthermore, pertinent regulations state that, for purposes of occupational diseases, the respective notice and filing periods do not begin to run until the employee is disabled or, in the case of a retired employee, until a permanent impairment exists. **Lombardi v. General Dynamics Corp.**, 22 BRBS 323, 326 (1989); **Curit v. Bath Iron Works Corp.**, 22 BRBS 100 (1988); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); 20 C.F.R. §702.212(b) and §702.222(c).

The Benefits Review Board has discussed the pertinent elements of an occupational disease in **Gencarelle v. General Dynamics Corp.**, 22 BRBS 170 (1989), **aff'd**, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

It is well-settled that the employer has the burden of establishing that the claim was not timely filed. 33 U.S.C. §920(b); **Fortier v. General Dynamics Corporation**, 15 BRBS 4

(1982), **appeal dismissed sub nom. Insurance Company of North America v. Benefits Review Board**, 729 F.2d 1441 (2d Cir. 1983).

As Claimant's date of injury is July 8, 1996, her claim for benefits, dated July 30, 1996 (RX 34), satisfies the requirements of Section 13(b)(2) for her occupational illness.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to Claimant's age, education, industrial history and the availability of work she can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which she is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of her disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that she is unable to return to her former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which she could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that she has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), she bears the burden of demonstrating her willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that she is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the Claimant is totally disabled, she is limited to the compensation provided by the appropriate schedule provision for her knee injury. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, she may have to be compensated under the applicable portion of Sections 8(c)(1) - (20), with the awards running consecutively. **Potomac Electric Power Co. v. Director, OWCP**, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.**, 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

On the basis of the totality of this closed record, I find and conclude that Claimant has established that she cannot return to work for the Employer. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit probative and persuasive evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability, as shall be further discussed below.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d

208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the

burden of proof in a temporary total case is the same as in a permanent total case. **Bell, supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **See Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**. 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. **Louisiana Ins. Guaranty Assn. v. Abbott,** 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994); **Leech v. Service Engineering Co.,** 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. **Kuhn v. Associated press**, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 200 (1986); **White v. Exxon Corp.,** 9 BRBS 138 (1978), **aff'd mem.**, 617 F.2d 292 (5th Cir. 1982).

In the case at bar, the medical evidence from Dr. Ayers reflects that Claimant's psychological condition is fairly constant, although it involves "ups and downs." Dr. Ayer's description of Claimant's condition and limitations is comparable to the description offered by Dr. Schmidt following his September 1, 1998 examination. Dr. Ayers reiterated his opinions at his June 1, 2001 deposition, the transcript of which

is in evidence as RX 59. The doctor's treatment notes are in evidence as RX 60.

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on September 1, 1998 and that she has been permanently and totally disabled from September 2, 1998, according to the well-reasoned opinion of Dr. Schmidt.

With reference to Claimant's residual work capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because she does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between Claimant's pre-injury average weekly wage and her post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the

wages claimant's post-injury job paid **at the time of her injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright that employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of her injury. That is exactly what Section 8(h) provides in its literal language.

While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternate employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken on this issue many times and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

As noted above, Jay H. Weisz met with Claimant on March 1, 1996 and offered her alternate work at the CDC at the Youth Center with hours from 6:30 a.m. to 9:00 a.m. and 2:00 p.m. to 6:00 p.m., for a total of 32.50 hours per week. The salary was $6.50 per hour and Claimant requested one week to think over that job transfer. (RX 45 at 1) While on March 13, 1996 Claimant advised Mr. Weisz "that she was not interested due to the hours," I note that such job is not within her work restrictions and that job would still leave Claimant in close proximity to Ms. Green, as further discussed below. (RX 45 at 2)

The Employer has also offered the March 7, 2001 Labor Market Survey (RX 53) wherein Byron "Buck" Hall, Jr., MA, CRC, indicates that he had identified several openings for Claimant as a child development assistant, child care worker and pre-school teacher, within her restrictions, at five child care centers in the Salt Lake City area at entry level wages of from $5.50 to $7.50 depending on experience, or $9.50 for someone with a college degree. With reference to these five (5) employers, Mr. Hall stated as follows (RX 53 at 4):

"SUMMARY AND CONCLUSION

Of the five employers contacted, only one had a concern with regard to an applicant with limitations of no squatting, kneeling and lifting and carrying of no more than 10 pounds. Employers contacted indicated someone with these limitations and restrictions would need to work with older children ages 4 and above. Only one employer, West Jordan Child Center, had concerns regarding their assistant teachers, which are required to be active with the children and kneeling and squatting may be required some of the time. This employer suggested an applicant come in for a trial day and see if they can perform the physical requirements of the job. Starting salaries range from $5.50 per hour to $9.50 per hour with a college degree. Most of the employers indicated a relatively high turn over for assistant teachers."

Mr. Hall also identified suitable alternate work as a receptionist/office clerical worker at five (5) companies in the Greater Salt Lake City area at entry level wages of $7.00 to $9.25 plus commissions. I note that, as of March 7, 2001, four of the 5 jobs had been filled and were no longer available. With reference to these jobs, Mr. Hall concluded as follows (RX 53 at 7):

"SUMMARY

The employers listed above were contacted as they were currently recruiting through the newspaper want ad in the Salt Lake

Tribune. There appears to be entry-level positions for clerical/office clerk/receptionist and scanner positions. All of the employers indicated that lifting and carrying 10 pounds would not be a requirement but most of them indicated that squatting and kneeling requirements would be necessary to reach filing cabinets at ground floor level. Some employers indicated this could be accommodated by a person sitting in a chair to retrieve filing materials at the ground floor level of a filing cabinet. Most employers contacted indicated they would be expected to provide on-the-job training as it was understood that the person coming in would be unskilled in this position. The Personnel Department, a temporary agency, indicated they are very similar to other temporary agencies in that they do sometimes have calls from employers for entry level filing positions and general office clerical people. The receptionist position is generally an entry level position in most clerical and office settings. Salary ranges range from $7.00 an hour to $8.50 per hour and one employer had a salary range of $9.50 per hour plus commission for collection agent.

With reference to work as a sales agent/sales person of general merchandise, work as an independent "market research representative" for Pro-Active Marketing is remunerated on the basis of $2.00 per job lead. A job as a sales person at Designers Resource paid $7.00 per hour for part-time work, 15-20 hours per week, however with no benefits. With reference to these two "jobs," Mr. Hall concluded as follows (RX 53 at 8):

"There is a health market for sales people in the Salt Lake valley. However, a lot of the sales advertisements in the **Salt Lake Tribune** require continuous standing or walking and previous sales experience. Many of the sales positions advertise pay on commission, good customer skills, computer skills, motivation and may require travel," according to Mr. Hall.

With reference to work at bench assembly or on an assembly line, Mr. Hall identified work at one firm, at an entry level wage of $7.00 and there were no openings at the two other firms he contacted. With reference to this type of work, Mr. Hall concluded as follows (RX 53 at 10):

"SUMMARY

Through the contact of these employers, there is entry-level assembly work. Some of the lifting and carrying requirements exceed 10 pounds and require squatting and kneeling. Two of the temporary agencies indicated that physical requirements and skill level vary depending on the needs of the employer. In demand now, are electrical and mechanical type assembly work with two years experience required. Most assembly work either requires continuous standing or continuous sitting. Staffing

agencies appear willing to register entry-level assembly workers with their firms and wait to see if calls come from employers that require entry level skills. Salary ranges from $7 per hour to $10 per hour depending on experience," according to Mr. Hall.

Mr. Hall reiterated his opinions at his July 17, 2001 deposition, the transcript of which is in evidence as RX 58, and the testimony and opinions of Mr. Hall will be further discussed below.

The Employer has also offered the testimony of Lisa Young, a private investigator who conducted a surveillance investigation of the Claimant on February 20 and February 21, 2001. (TR 378-406) Ms. Young testified she followed Claimant, as part of a mobile surveillance, around the Greater Salt Lake City Area to several stores, companies, restaurants and other enterprises. Claimant was observed getting into and out of her car without any difficulty and she was able to spend some time during the day on her various errands and, according to the Employer's essential thesis, this testimony establishes that she has a residual work capacity far in excess of that to which she testified at the hearing.

Employer sent private investigators to monitor Claimant's activities in Utah. (TR 377) This investigative company conducted surveillance on two different occasions. In November 1998, the investigator watched Claimant over a total of 9 days and saw her leave her apartment only once. (CX 61-2) On that one occasion, she was driven by another person to attend a doctor's appointment. (CX 61-5) In February 2001, Lisa Young watched Claimant for two days. (Tr 378) She observed Claimant drive to a mental health appointment, then drive to several nearby stores where she parked either in a handicapped parking space or as close to the building as she could. (TR 382-84) Claimant then drove to an office where she sat, doing something for close to two hours. (TR 385) Claimant then went to the LDS humanitarian center where she picked up another woman and drove her to a restaurant. (TR 385) Claimant then went home, and stayed in her apartment for the rest of the day. (TR 386-87) The following day, Lisa Young observed Claimant take her daughter to a hospital, browse at a nearby store and then go to another hospital. (TR 387-89) Claimant later went to a restaurant and then home. (TR 389-90)

This testimony is not dispositive, notwithstanding the Employer's thesis, because there is no requirement under the Act that the Claimant be totally bedridden to be entitled to an award of disability benefits, and I so find and conclude.

Moreover, it is apparent that Claimant needs vocational retraining for another field of endeavor and in this regard the following December 11, 1997 letter is pertinent (CX 54):

"To whom it may concern:

"My name is Hector E. Cando and I am currently Ms. Smith's Vocational Rehabilitation Counselor. Although, Ms. Smith applied for Vocational Rehabilitation Services in June 1997 and qualified for services in July 14, 1997, the Division of Rehabilitation Services is just currently addressing her needs by providing counseling, guidance, and other assistance to assure her rehabilitation progress. The reason why Ms. Smith asked me to write this letter, is to let you know she may not have been involved with the court system if her disabling condition would have been addressed. Although I'm not quite sure as to the extend (sic) of her rehabilitation progress, at least she may have had the support system that she do (sic) desperately needs.

"I have spoken with Ms. Smith and she realizes that in order for her to be fully rehabilitated she needs to follow through with the medical recommendations and especially with psychotherapy with Valley Mental Health. I will do what I can to assist her on her rehabilitation progress. I realize however that she needs to put forth an effort so that the psychotherapy, medication, my counseling and guidance will work towards her speedy recovery," according to Mr. Cando, whose opinions I accept as most probative and persuasive.

With reference to the alleged job offer of alternate employment at the Youth Center, the Employer submits that such work constitutes suitable and alternate employment. However, there is no evidence that Claimant is able to perform this job. Dr. Basinger recommended, and Employer agreed, that Claimant was psychologically unable to fulfill the cognitive duties associated with caring for children. (CX 28-2) Employer introduced no evidence about the requirements of the youth center job. In particular, there is no evidence that the cognitive duties associated with caring for older children would be any less. More significantly, the alternate job was offered in March 1996. (RX 45) At that time, Claimant was still performing her regular job. It was not until September and October of 1996 that Dr. Laughlin and Dr. Basinger opined that Claimant could not perform her regular job. After that point, Employer did not renew the youth center job offer and made no other offer of suitable alternate employment.

With reference to the Employer's Labor Market Surveys (RX 40, RX 52), Mr. Hall conducted those for the Salt Lake City, Utah area. This was appropriate because Claimant has made a

reasonable and good faith move to Utah to leave Florida, Ms. Green and her experiences at the CDC. In this regard, **see Wood v. U.S. Department of Labor**, 112 F.3d 592, 31 BRBS 43, 46 (CRT) (1st Cir. 1997), a matter over which this Administrative Law Judge presided.

However, I have given little weight to the labor market surveys because Mr. Hall was asked only to evaluate Claimant's physical abilities, and not to pay attention to her obvious psychological disability. (RX 58 at 18-19) He acknowledged that he reviewed Dr. Schmidt's report and that this would be a very significant piece of information to incorporate if he were actually trying to place Claimant in a job. (**Id.** at 18) Mr. Hall does not establish that the jobs he identified are suitable for Claimant or that she could realistically secure and perform them, given her psychological difficulties. His evidence does not rebut the presumption of total disability, and I so find and conclude.

Employer points to Claimant's "work" experience in Utah as evidence that suitable work is available to her. If anything, Claimant's work efforts in Utah demonstrate her inability to secure and perform any suitable work. Since moving to Utah, Claimant has performed no regular work. (TR 77) She entered a paid, job training program through her church. (TR 77, 119; CX 55) It was not a regular job. (CX 63-4) This rehabilitation program was supposed to last for one year but was extended because Claimant missed so much time from the program because of her multiple medical problems. (TR 119) Ultimately, she was unable to complete the training. Because Claimant's health problems seemed to be worsened by the work, she was eventually released to an unpaid medical leave beginning June 1, 1999. (CX 55, 56) Sheltered employment has long been held to be insufficient to constitute suitable alternate employment. **Harrod v. Newport News Shipbuilding & Dry Dock Co.**, 12 BRBS 10 (1980). This should be particularly true where the Claimant is not even successful in the sheltered employment. Claimant also volunteered to translate a manual into Spanish for an organization, but she does this project less than once a week. (TR 76-77) Finally, Claimant took a course in phlebotomy that could have led to employment, but she did not pass the course. (TR 77) These efforts reflect the unavailability of suitable alternate work that Claimant can realistically secure and perform, and I so find and conclude.

The Employer also relies on the opinion of Dr. Ginzburg that Claimant has no "psychiatric contraindication to her returning to work." This opinion does not establish that there is suitable alternate employment that Claimant could realistically secure and perform. The opinion is also unpersuasive from a medical perspective, as found above. After diagnosing a mood

disorder, noting Claimant's multiple suicide attempts and describing her reported difficulty with even leaving her room, Dr. Ginzburg's conclusory statement would require some explanation to be persuasive. The closest he comes to explaining this statement is his belief that it is not reasonable for Claimant to blame Ms. Green for all of her difficulties at Hurlburt. (RX 55-19, 55-20) In testimony, Dr. Ginzburg also pointed to Claimant's ability to "enter a sheltered work environment." (TR 152) Claimant's failed attempt to complete the sheltered workshop does not support Dr. Ginzburg's opinion. This opinion regarding disability is given little weight by me as it is outweighed by the preponderance of the evidence herein.

In particular, Dr. Ginzburg's opinion is given lesser weight than the carefully explained opinion of Claimant's treating physician, Dr. Ayers. **See Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144, 147 (CRT) (9th Cir. 1999), **cert. denied**, 120 S.Ct. 40 (1999) (under LHWCA, treating physician's opinion is entitled to special weight); **Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84, 89 (CRT)(2d Cir. 1997) (ALJ is bound by expert opinion of a treating physician as to the existence of a disability unless contradicted by substantial evidence). Dr. Ayers, Claimant's primary care physician in Utah, described her as unemployable due to her mood disorders and pain. (RX 59 at 29) He carefully explained that her depression and chronic pain make her an unreliable employee and described how mood disorders make people emotionally paralyzed to the point that they cannot function. (**Id.** at 28-29, 34) Dr. Schmidt, who conducted an evaluation for Employer in 1998, also opined that Claimant was not able to work. (CX 38-9, 38-10) These thorough opinions are entitled to greater weight, as I have already indicated above.

As indicated above, the Employer has offered the Labor Market Surveys and testimony of Mr. Hall in an attempt to show the availability of work for Claimant in those jobs summarized above. I cannot accept the results of that survey for the reasons stated above.

It is well-settled that the Employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to her new residence. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Employer must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to

establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

In the case **sub judice**, the parties are not in agreement that Claimant is, in fact, employable, although she did perform some "work" for the period of time summarized above, and the parties are in disagreement as to Claimant's post-injury wage-earning capacity.

Claimant's "work" at the LDS upon her moving to Utah is clearly sheltered or humanitarian work by a religious organization and is not, in my judgment, gainful employment within the meaning of the Act. In this regard, **see CNA Insurance Co. v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991), a matter over which I presided and which deals with the issue of sheltered employment and a reversal of an award of Section 8(f) benefits for three (3) separate and discrete back injuries.

In view of the foregoing, I cannot accept the results of the Labor Market Surveys because I conclude that those jobs do not constitute, as a matter of fact or law, **suitable** alternate employment or **realistic** job opportunities. In this regard, **see Armand v. American Marine Corporation**, 21 BRBS 305, 311, 312 (1988); **Horton v. General Dynamics Corp.**, 20 BRBS 99 (1987). **Armand** and **Horton** are significant pronouncements by the Board on this important issue.

Employer's evidence fails to show that there is suitable alternate work that Claimant can realistically secure and perform. Therefore, Claimant is permanently and totally disabled as of September 2, 1998.

Intervening Event

The issue in this case is whether any disability herein is casually related to, and is the natural and unavoidable consequence of, Claimant's work-related accidents or whether her 1997 motor vehicle accident constituted an independent and intervening event attributable to Claimant's own intentional or negligent conduct, thus breaking the chain of causality between the work-related injury and any disability he may now be experiencing.

The basic rule of law in "direct and natural consequences" cases is stated in Vol. 1 **Larson's Workmen's Compensation Law** §13.00 at 3-348.91 (1985):

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause [event] attributable to claimant's own intentional conduct.
>
> Professor Larson writes at Section 13.11:
>
> The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.
>
> The simplest application of this principle is the rule that all the medical consequences and natural sequelae that flow from the primary injury are compensable . . . The issue in all of these cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications. (**Id**. at §13.11(a))

This rule is succinctly stated in **Cyr v. Crescent Wharf & Warehouse**, 211 F.2d 454, 457 (9th Cir. 1954) as follows: "If an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury." **See also Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mississippi Coast Marine, Inc. v. Bosarge**, 632 F.2d 994 (5th Cir. 981), **modified**, 657 F.2d 665 (5th Cir. 1981); **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981).

Likewise, a state court has held: "We think that in this case the claimant has produced the requisite medical evidence sufficient to establish the causal connection between his present condition and the 1972 injury. The only medical evidence presented on the issue favors the Claimant." **Christensen v. State Accident Insurance Fund**, 27 Or. App. 595, 557 P.2d 48 (1976).

The case at bar is a situation in which the initial medical condition itself progresses into complications more serious than the original injury, thus rendering the added complications compensable. **See Andras v. Donovan**, 414 F.2d 241 (5th Cir. 1969). Once the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable as long as the worsening is not shown to have been produced by an independent or non-industrial cause. **Hayward v. Parsons Hospital**, 32 A.2d 983, 301 N.Y.S.2d 649 (1960). Moreover, the subsequent disability is compensable even if the triggering episode is some non-

employment exertion like raising a window or hanging up a suit, so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances.

However, a different question is presented when the triggering activity is itself rash in the light of claimant's knowledge of his condition. The issue in all such cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications, and denials of compensation in this category have invariably been the result of a conclusion that the requisite medical causal connection did not exist. **Matherly v. State Accident Insurance Fund**, 28 Or. App. 691, 560 P.2d 682 (1977). The case at bar does not involve a situation in which a weakened body member contributed to a later fall or other injury. **See Leonard v. Arnold**, 218 Va. 210, 237 S.E.2d 97 (1977). A weakened member was held to have caused the subsequent compensable injury where there was no evidence of negligence or fault. **J.V. Vozzolo, Inc. v. Britton**, 377 F. 2d 144 (D.C. Cir. 1967); **Carabetta v. Industrial Commission**, 12 Ariz. App. 239, 469 P.2d 473 (1970). However, the subsequent consequences are not compensable when the claimant's subsequent intentional act broke the chain of causation. **Sullivan v. B & A Construction, Inc.**, 122 N.Y.S.2d 571, 120 N.E.2d 694 (1954). If a claimant, knowing of certain weaknesses, rashly undertakes activities likely to produce harmful results, the chain of causation is broken by his own negligence. **Johnnie's Produce Co. v. Benedict & Jordan**, 120 So. 2d 12 (Fla. 1960). Nor is this a case involving a subsequent incident on the way to the doctor's office for treatment of the original work-related accident. **Fitzgibbons v. Clarke**, 205 Minn. 235, 285 N.W.2d 528 (1939); **Laines v. WCAB**, 40 Cal. Comp. Cases 365, 48 Cal. App. 3d 872 (1975). The visit to the doctor was based on the statutory obligation of the employer to furnish, and of the employee to submit to, a medical examination. **See Kearney v. Shattuck**, 12 A.D.2d 678, 207 N.Y.S.2d 722 (1960).

The Benefits Review Board reversed an award of benefits to a claimant who had sustained an injury to his left leg, when he fell from the roof of his house after his injured knee collapsed under him, while attempting to repair his television antenna. Eighteen months earlier this claimant had injured his right knee in a work-related accident, such claimant receiving benefits for his temporary total disability and for a rating of fifteen percent permanent partial disability of the leg. The Board reversed the award for additional compensation resulting from the second injury. **Grumbley v. Eastern Associated Terminals Co.**, 9 BRBS 650 (1979). The Benefits Review Board held,

"[U]nder Section 2(2) of the Act, the second injury to be compensable must be related to the original injury. Therefore, if there is an intervening cause or event between the two injuries, the second injury is not compensable. Thus, this Administrative Law Judge must focus on whether the second injury resulted 'naturally or unavoidably.' Therefore, claimant's action must show a degree of due care in regard to his injury." Furthermore, the Board held, "[c]laimant obviously did not take any such precautions, nor did the record show that any emergency situation existed that would relieve claimant from such allegation." **Grumbley**, **supra**, at 652.

Applying these well-settled legal principles to the case at bar, and based upon the totality of the record, I find and conclude that Claimant's 1997 MVA was not an intervening cause which is attributable only to Claimant's subsequent intentional conduct and which broke the chain of causality between Claimant's work-related incident and her present condition. Claimant's actions did exhibit the requisite amount of due care in regard to her previous injury. Accordingly, the Employer is responsible for all disability and medical expenses awarded herein.

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during **substantially** the whole of the year immediately preceding his injury. **Mulcare v. E.C. Ernst, Inc.**, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, **i.e.**, whether it is intermittent or permanent, **Eleazar v. General Dynamics Corporation**, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by

weather conditions or by the employer's varying daily needs. **Lozupone v. Stephano Lozupone and Sons**, 12 BRBS 148, 156 and 157 (1979). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. **Hole v. Miami Shipyards Corp.**, 12 BRBS 38 (1980), **rev'd and remanded on other grounds**, 640 F.2d 769 (5th Cir. 1981). The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. **See O'Connor v. Jeffboat, Inc.**, 8 BRBS 290 (1978). **See also Brien v. Precision Valve/Bayley Marine**, 23 BRBS 207 (1990); **Klubnikin v. Crescent Wharf & Warehouse Co.**, 16 BRBS 183 (1984). Moreover, since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment. **See Waters v. Farmer's Export Co.**, 14 BRBS 102 (1981), **aff'd per curiam**, 710 F.2d 836 (5th Cir. 1983). Accordingly, this Administrative Law Judge should include the weeks of vacation as time which claimant actually worked in the year preceding her injury. **Duncan v. Washington Metropolitan Area Transit Authority**, 24 BRBS 133, 136 (1990); **Gilliam v. Addison Crane Co.**, 21 BRBS 91 (1987). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," **Duncan**, **supra**, but 33 weeks is not a substantial part of the previous year. **Lozupone**, **supra**. Claimant was not a regular 5 or 6 day a week worker at the time of her psychological injury. Therefore Section 10(a) is inapplicable. The second method for computing average weekly wage, found in Section 10(b), cannot be applied because of the paucity of evidence as to the wages earned by a comparable employee. **Cf. Newpark Shipbuilding & Repair, Inc. v. Roundtree**, 698 F.2d 743 (5th Cir. 1983), **rev'g on other grounds**, 13 BRBS 862 (1981), **rehearing granted en banc**, 706 F.2d 502 (5th Cir. 1983), **petition for review dismissed**, 723 F.2d 399 (5th Cir. 1984), **cert. denied**, 469 U.S. 818, 105 S.Ct. 88 (1984).

Whenever Sections 10(a) and (b) cannot "reasonably and fairly be applied," Section 10(c) is applied. **See National Steel & Shipbuilding Co. v. Bonner**, 600 F.2d 1288 (9th Cir. 1979); **Gilliam v. Addison Crane Company**, 22 BRBS 91, 93 (19987). The use of Section 10(c) is appropriate when Section 10(a) is inapplicable and the evidence is insufficient to apply Section 10(b). **See generally Turney v. Bethlehem Steel Corporation**, 17 BRBS 232, 237 (1985); **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Holmes v. Tampa Ship Repair and Dry Dock Co.**, 8 BRBS 455 (1978); **McDonough v. General Dynamics Corp.**, 8 BRBS 303 (1978). The primary concern when applying Section 10(c) is to determine a sum which "shall reasonably represent the . . . earning capacity of the injured employee." The Federal Courts

and the Benefits Review Board have consistently held that Section 10(c) is the proper provision for calculating average weekly wage when the employee received an increase in salary shortly before his injury. **Hastings v. Earth Satellite Corp.**, 628 F.2d 85 (D.C. Cir. 1980), **cert. denied**, 449 U.S. 905 (1980); **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981). Section 10(c) is the appropriate provision where claimant was unable to work in the year prior to the compensable injury due to a non-work-related injury. **Klubnikin v. Crescent Wharf and Warehouse Company**, 16 BRBS 182 (1984). When a claimant rejects work opportunities and for this reason does not realize earnings as high as his earning capacity, the claimant's actual earnings should be used as his average annual earnings. **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Conatser v. Pittsburgh Testing Laboratory**, 9 BRBS 541 (1978). The 52 week divisor of Section 10(d) must be used where earnings' records for a full year are available. **Roundtree**, **supra**, 13 BRBS 862 (1981); **compare Brown v. General Dynamics Corporation**, 7 BRBS 561 (1978). **See also McCullough v. Marathon LeTourneau Company**, 22 BRBS 359, 367 (1989).

Claimant initially posits that her average weekly wage should be computed on her earning capacity at the time of the injury. 33 U.S.C. §910. Because Claimant’s knee condition contributes to her psychological condition, the average weekly wage should be the stipulated $244 average weekly wage for the right knee injury. **See Merrill v. Todd Pacific Shipyards, Inc.**, 25 BRBS 140, 150 (1991). (In cases where an injury is the natural progression or unavoidable result of the initial injury, the average weekly wage is calculated from the date of the initial injury.)

However, as Claimant’s right knee injury occurred on March 21, 1993 and as I have concluded that her psychological problems constituted **a new and discrete injury** on June 8, 1996, Section 10 does not permit use of her average weekly wage for her March 21, 1993 traumatic injury.

Accordingly, Claimant’s average weekly wage should be calculated using section 10(c). This section is a “catch all provision” that applies when a claimant’s work is intermittent and irregular or the methods of calculation under section 10(a) and (b) cannot be reasonably or fairly applied. 33 U.S.C. §910(c); **See, e.g. Story v. Navy Exchange Service Center**, 30 BRBS 225, 228 (1997). Although Claimant had worked for employer for many years prior to May 10, 1996, her hours had been reduced just shortly before that date. In June 1996, Employer reduced Claimant’s guaranteed hours from 32.5 to 20, at the hourly rate of $8.51. (RX 37-5) Employer directed that the change be made retroactive to April 12, 1996. (**Id**.) Thus, if Claimant’s daily

wage on June 8, 1996 were used to calculate her average weekly wage, it would not be a fair calculation of her earning capacity, according to Claimant.

The goal under Section 10(c) is to find a fair and reasonable approximation of the Claimant's annual wage-earning capacity at the time of the injury. **Wayland v. Moore Dry Dock**, 25 BRBS 53, 59 (1991). Until the month before her depression diagnosis, Claimant had been earning $8.51 per hour with a guarantee of 32.5 hours. (RX 37-5) In the absence of her psychological injury, Claimant would have been able to supplement those hours with other child care work or would have been available to accept hours that might become available with Employer beyond the guaranteed minimum. Thus, as Claimant's psychological condition is recognized as a new claim, a reasonable calculation of Claimant's wage earning capacity prior to injury is based on her weekly earnings until immediately before that time, $276.56, and I so find and conclude. It is most unfair to Claimant to use the 20 hour work week schedule as of July 7, 1998 as she had recently been reduced to that amount.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference

this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir.

1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of her work-related psychological problems on or about July 30, 1996 and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer has consistently refused to accept the claim for benefits for her psychological problems.

Accordingly, in view of the foregoing, I find and conclude that the Employer is responsible for the reasonable, necessary and appropriate medical care and treatment in the diagnosis, evaluation and treatment of Claimant’s psychological problems, diagnosed as depression, commencing on July 8, 1996 and such medical care and treatment shall be subject to the provisions of Section 7 of the Act. Claimant is also entitled to an award relating to the care and treatment of her right lower extremity and lumbar problems, also subject to the provisions of Section 7.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as

the Employer timely controverted her entitlement to benefits for her psychological problems. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **Director, OWCP v. Luccitelli**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992), **rev'g Luccitelli v. General Dynamics Corp.**, 25 BRBS 30 (1991); **Director, OWCP v. General Dynamics Corp.,** 982 F.2d 790 (2d Cir. 1992); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-

existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

An x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. **Topping v. Newport News Shipbuilding**, 16 BRBS 40 (1983); **Musgrove v. William E. Campbell Co.**, 14 BRBS 762 (1982).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not

satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

As the Employer's brief is silent on this issue, I assume the issue has been waived.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer as a self-insurer. Claimant's attorney has not submitted his fee application. Within thirty (30) days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Employer's counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after June 13, 1997, the date of the informal conference. Services performed prior to that date should be submitted to the District Director for her consideration.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for her temporary total disability from July 8, 1996 through September 1, 1998, based upon an average weekly wage of $276.56, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on September 2, 1998 the Employer shall pay to the Claimant compensation benefits for her permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $276.56, such compensation to be computed in accordance with Section 8(a) of the Act.

3. The Employer shall also pay to Claimant compensation for her twenty-one (21%) percent permanent partial disability of the right leg, based upon his average weekly wage of $244.00, such compensation to be computed in accordance with Section 8(c)(2) of the Act and shall commence on November 28, 1994.

4. The Employer shall receive credit only for the dollar amount of the sixteen (16%) percent permanent partial disability previously paid to the Claimant as a result of her right knee injury.

5. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

6. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injuries referenced herein, **i.e.**, her right knee, lumbar and psychological problems, may require, and as specifically discussed and awarded herein.

7. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on June 13, 1997.

A
DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:jl